Supreme Court, U.S.
FILED

(1)

96 415 SEP 9 1996

No. 96- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

REPUBLICAN NATIONAL COMMITTEE,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

and

NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

JAN WITOLD BARAN
Counsel of Record
JASON P. CRONIC
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Counsel for Petitioners

September 9, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

142 pp

QUESTION PRESENTED

Does *Buckley v. Valeo* or the Federal Election Campaign Act authorize the Federal Election Commission to prohibit political committees' speech in an ostensible effort to increase disclosure of contributor information by such political committees, where Congress has determined that contributors have the right to withhold the information?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	vii
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
THE ORIGINAL BEST EFFORTS REGULATION	4
THE NEW BEST EFFORTS REGULATION	5
THE LEGAL CHALLENGE	9
REASONS FOR GRANTING THE WRIT	12
I. *BUCKLEY v. VALEO* NEVER AUTHORIZED THE UNLIMITED REGULATION OF SPEECH BY THE FEDERAL ELECTION COMMISSION	13
II. THE FEDERAL ELECTION COMMISSION CANNOT JUSTIFY THE SPEECH PROHIBITION IMPOSED BY THE BEST EFFORTS REGULATION	17
A. The Best Efforts Regulation Is Content-Based	18
B. The FEC Can Show No Compelling Interest Supporting Its Regulation	19
C. The Best Efforts Regulation Is Not Narrowly Tailored	20

TABLE OF CONTENTS—Continued

Page

III. THE BEST EFFORTS REGULATION IS CONTRARY TO THE FEDERAL ELECTION CAMPAIGN ACT 22

A. Congressional Intent Precludes The FEC's Current Definition Of "Best Efforts" 23

B. The FEC's Interpretation Of "Best Efforts" Is An Unreasonable Interpretation Of § 432(i) 25

CONCLUSION 26

APPENDIX A

February 20, 1996, Opinion of the United States Court of Appeals for the District of Columbia Circuit 1a-22a

APPENDIX B

July 22, 1996, Memorandum Opinion and Order of the United States District Court for the District of Columbia 23a-35a

APPENDIX C

June 11, 1996, Order of the United States Court of Appeals for the District of Columbia Circuit Denying Appellants' Suggestion for Rehearing *In Banc* 36a

APPENDIX D

June 11, 1996, Order of the United States Court of Appeals for the District of Columbia Circuit Denying Appellants' Petition for Rehearing 37a

APPENDIX E

April 16, 1996, Order of the United States Court of Appeals for the District of Columbia Circuit Ordering Appellee to Respond to Appellants' Petition for Rehearing and Suggestion for Rehearing *In Banc* 38a

TABLE OF CONTENTS—Continued

APPENDIX F Page

February 20, 1996, Order of the United States Court of Appeals for the District of Columbia Circuit Ordering the Clerk Withhold Issuance of Mandate Until Disposition of Any Petition for Rehearing 39a

APPENDIX G

October 22, 1993, Final Rule; Transmittal of Regulations to Congress, 58 Fed. Reg. 57,725-729 (1993) 40a-54a

APPENDIX H

September 18, 1992, Notice of Proposed Rulemaking, 57 Fed. Reg. 44,137-138 (1992) 55a-59a

APPENDIX I

March 7, 1980, Excerpted Transmittal of Regulations to Congress, 45 Fed. Reg. 15,080, 15,086, 15,114 (1980) 60a-63a

APPENDIX J

January 23, 1980, Excerpted Notice of Proposed Rulemaking, 45 Fed. Reg. 5,546, 5,560 (1980) 64a-66a

APPENDIX K

April 30, 1996, Federal Election Commission Opposition to Petition for Rehearing and Suggestion for Rehearing *In Banc* 67a-78a

APPENDIX L

April 5, 1996, Republican National Committee Petition for Rehearing and Suggestion for Rehearing *In Banc* 79a-91a

TABLE OF CONTENTS—Continued

APPENDIX M — Page

September 14, 1995, Excerpted Transcript of Oral Argument Before United States Court of Appeals for the District of Columbia Circuit 92a-103a

APPENDIX N

11 C.F.R. § 104.7 (1993) (New "Best Efforts" Regulation) 104a-106a

APPENDIX O

11 C.F.R. § 104.7 (1980) (Original "Best Efforts" Regulation) 107a

TABLE OF AUTHORITIES

Cases	Page
Buckley v. Valeo, 424 U.S. 1 (1976)	*passim*
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	22, 24, 25
City of Ladue v. Gilleo, 114 S. Ct. 2038 (1944)	20, 21, 22
City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988)	16
Colorado Republican Fed. Campaign Comm. v. FEC, 59 F.3d 1015 (10th Cir. 1995)	14
Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996)	14
Consolidated Edison v. Public Service Comm'n, 447 U.S. 530 (1980)	16, 17, 19
Denver Area Educ. Telecom. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996)	21
Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568 (1988)	24, 25
FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27 (1981)	24
First Nat. Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	16, 17
Good Samaritan Hosp. v. Shalala, 508 U.S. 402 (1993)	23
McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995)	16, 18, 19
Metromedia, Inc. v. San Diego, 453 U.S. 490 (1990)	21
Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)	19, 24
Posadas de Puerto Rico Assoc. v. Tourism Co. of P.R., 478 U.S. 328 (1986)	15
Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995)	17
Schneider v. State, 308 U.S. 147 (1939)	21
Simon & Shuster, Inc. v. New York Crime Victims Bd., 112 S. Ct. 501 (1991)	19
44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996)	15, 16

TABLE OF AUTHORITIES—Continued

Statutes	Page
2 U.S.C. § 431(13) (1980)	14
2 U.S.C. § 432(i) (1980)	*passim*
2 U.S.C. § 434(b) (1980)	14, 24
2 U.S.C. § 434(b) (1976)	24
2 U.S.C. § 438(d) ((1980)	5
2 U.S.C. § 441g (1980)	3
28 U.S.C. § 1254(1) (1988)	2
Miscellaneous	
11 C.F.R. § 104.7 (1993)	*passim*
11 C.F.R. § 104.7 (1980)	*passim*
FEC Notice of Proposed Rulemaking, 45 Fed. Reg. 5,546 (1980)	23
FEC Notice of Proposed Rulemaking, 45 Fed. Reg. 5,560 (1980)	23
FEC Transmittal of Regulation, 45 Fed. Reg. 15,080 (1980)	23
FEC Notice of Proposed Rulemaking, 57 Fed. Reg. 44,137 (1992)	5
H.R. Rep. No. 422, 96th Cong., 1st Sess. (1979)	23, 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-

REPUBLICAN NATIONAL COMMITTEE,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

and

NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

The Republican National Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee (collectively "the Committees") respectfully petition this Court for a writ of *certiorari* to review the judgment in this case of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS AND ORDERS BELOW

The June 11, 1996, orders denying rehearing and rehearing *in banc* are unreported and are reproduced at Appendix ("App.") 36a-37a bound with this petition.

The February 20, 1996, Opinion of the United States Court of Appeals for the District of Columbia Circuit affirming in part and reversing and remanding in part the district court decision is reported at 76 F.3d 400 and is reproduced at App. 1a-22a. The July 22, 1996, Memorandum Opinion and Order of the United States District Court for the District of Columbia is unreported and is reproduced at App. 23a-35a.

JURISDICTION

The court of appeals entered judgment in this case on February 20, 1996. That court denied the Committees' petition for rehearing and suggestion for rehearing *in banc* on June 11, 1996. This petition is being filed within 90 days of the date the court of appeals denied the Committees' petition for rehearing. The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The governing statutory provision, 2 U.S.C. § 432(i) (1980), provides:

> When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act or chapter 95 or chapter 96 of Title 26.

The challenged regulation, 11 C.F.R. § 104.7 (1993) ("the best efforts regulation"), is reproduced in its entirety at App. 104a-106a. The text of the earlier version of the best efforts regulation, 11 C.F.R. § 104.7 (1980), is set out at App. 107a.

The First Amendment of the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case is a challenge to a rule promulgated by the Federal Election Committee ("FEC") purporting to implement 2 U.S.C. § 432(i) of the Federal Election Campaign Act ("FECA" or "the Act"). That provision was enacted in 1980 and states that treasurers of political committees who have used "best efforts" in obtaining, maintaining, and reporting the name, address, occupation, and employer of contributors whose aggregate contributions to their committees exceed $200 per calendar year shall be deemed in compliance with the Act's reporting provisions otherwise requiring reporting of such information. Thus, the overall statutory scheme does not actually mandate that political committees report the identifying information for all contributors of over $200—it only requires that the committees make their "best efforts" to obtain the information and report all the information that they do obtain. This distinction is critical, as contributors are under *no* obligation to provide any of the information.[1]

The definition of "best efforts" is of particular importance to the Committees because of their large size compared with other political committees. The Committees are the primary political committees of the Republican Party at the national level. The RNC is an unincorporated association comprised of 165 members that is responsible for the day-to-day operation of the Republican Party. The NRSC is a political committee comprised of

---

[1] FECA prohibits political committees from accepting anonymous contributions of over $50 and cash contributions of over $100 per year. 2 U.S.C. § 441g. As contributions by check almost always provide the donor's name and address, the major focus of the best efforts requirement is employer and occupation data.

members of the United States Senate organized to support Republican candidates in senatorial elections. Similarly, the NRCC is a political committee comprised of members of the United States House of Representatives organized to support Republican candidates in elections to the House. The Committees receive contributions from over a million contributors each year and thus are forced to rely on the protection offered by the best efforts provision, as the sheer volume of contributions makes it virtually impossible to collect all of the information the statute would otherwise necessitate.[2]

THE ORIGINAL BEST EFFORTS REGULATION

The FEC initially defined what constituted "best efforts" for political committees in 1980, immediately after the 1979 amendments to FECA enacted § 432(i). *See* 11 C.F.R. § 104.7 (1980) (App. 107a). That regulation required a political committee to make at least one effort per solicitation (in writing or by an oral request documented in writing) to obtain the contributor information. *Id.* The regulation defined that effort as "a clear request for the information . . . which . . . informs the contributor that the reporting of such information is required by law." *Id.* Thus, if a political committee included a single clear request for the information in every solicitation, informing the solicitee that the committee was required to report the information requested, it would have been deemed to have exercised its best efforts. The FEC was satisfied with this definition for over a decade.

---

[2] The volume of contributions received explains why the costs of the new regulation are so severe with respect to the Committees. The Committees presented evidence below that, once personnel and other such costs are included, compliance with the new regulation will result in an annual expense between $300,000 and $1,200,000. That is a considerable outlay of contributors' funds originally donated for the purpose of promoting political speech.

THE NEW BEST EFFORTS REGULATION

In 1992 the FEC decided to redefine what efforts would satisfy the best efforts provision. The FEC explained that:

> experience shows that the request[s] [for the contributor information by the political committees] and the notice about reporting requirements often appear in small type and in a way that does not adequately convey their importance. Moreover, current regulations do not clarify what responsibilities a committee has if the contribution does not correspond to a particular solicitation and it is impossible to know if the proper request and notice were provided. These weaknesses in the current 'best efforts' regulations appear to have led to a significant percentage of incomplete [reporting of contributor information] for some committees.

FEC Notice of Proposed Rulemaking, 57 Fed. Reg. 44,137 (1992) (App. 55a-59a). From this initial proposal, the FEC eventually developed the presently challenged regulation, effective as of March 3, 1994.

As promulgated, 11 C.F.R. § 104.7 (1993) imposed four principal requirements on political committees:

1) *Solicitations:* All initial written solicitations had to make a clear and conspicuous request for the information and include the following required statement: "Federal law requires political committees to report the name, mailing address, occupation, and name of employer for each individual whose contributions aggregate in excess of $200 in a calendar year." 11 C.F.R. § 104.7(b)(1) (App. 104a). This applied no matter how much money the solicitee had previously contributed during the calendar year. The Explanation and Justification [8] for this section reported that some comments to the FEC during

[8] Section 438(d) of FECA requires that the FEC provide a "detailed explanation and justification" for all rules it prescribes.

the rulemaking indicated that an initial clear request was a "successful, financially feasible method" of obtaining contributor information. (App. 45a).

The Explanation and Justification did not discuss any comments regarding the required statement. No comments were submitted on this point because the required statement was not mentioned in the Notice of Proposed Rulemaking. The FEC did, however, explain that the required statement was intended to prevent language such as "Federal law requires political committees to ask for this information" without further explanation. *Id.* The FEC stated that such language would not constitute best efforts because it failed to generate adequate response rates.[4] The FEC, however, never explained what level of complete contributor information it considered adequate.

2) *Follow-Up Requests:* For each contribution received from an individual contributor aggregating in excess of $200 per calendar year lacking complete contributor information, political committees were required to make at least one effort after receipt of the contribution to obtain the information. 11 C.F.R. § 104.7(b)(2) (App. 104a-105a). The effort could be written or oral and documented in writing, and had to be made within 30 days of receipt of the contribution. *Id.* The request had to ask clearly for the missing information and had to include the required statement quoted above.[5] *Id.* Additionally, the regulation banned speech "on any other subject" or any solicitation for a contribution, with the sole exception of allowing the inclusion of a statement thanking the con-

---

[4] As discussed further below, the appellate court found the required statement to be unreasonable and contrary to FECA, and thus invalidated those portions of the regulation that imposed this requirement. (App. 9a-10a). The Committees do not challenge this conclusion.

[5] *See* note 4, *supra*.

tributor for his or her past contribution.[6] *Id.* Finally, written requests had to include a pre-addressed return postcard or envelope for the response material. *Id.*

The Explanation and Justification for this provision indicated that the FEC banned speech in order "to ensure that a written request for the information [was] not overlooked." (App. 46a). It further provided that this mandatory follow-up was required regardless of whether the initial solicitation contained a clear and conspicuous request.

3) *Reporting:* Treasurers were obligated to report all contributor information not provided by the contributor but in the political committee's possession, such as from prior records and previously filed reports, in the same two-year election cycle. 11 C.F.R. § 104.7(b)(3) (App. 105a).

The Explanation and Justification stated that, during the rulemaking, political committees reported that this required use of past information enhanced reporting of contributor information, but that committees differed regarding how much this measure cost. (App. 49a). The FEC indicated that it did not require all information personally known to a political committee's treasurer or his or her agents, as it feared this would encourage guessing at contributor information. (App. 50a).

---

[6] The FEC has changed its position regarding whether the ban on speech on "any other subject" operates to allow only the required statement and a thank-you in the follow-up letter, or whether additional explanation of the political committee's requirements under the best effort standard is allowed. The former position was adopted by FEC counsel at oral argument before the appellate court, Transcript of Oral Argument at 17 (App. 93a-94a), while the latter was adopted in the FEC's Opposition to the Committees' Petition for Rehearing and Suggestion for Rehearing *In Banc*, FEC Opposition at 4 (App. 69a-70a). The dissenting opinion below clearly believed that the former interpretation governed. (App. 18a-19a). In any case, it is undisputed that *all speech* not relating directly to the regulation is banned.

4) *Updates:* The regulation required political committees to update information when they obtained previously unreported contributor information. 11 C.F.R. § 104.7(b)(4) (App. 105a-106a). This requirement, however, only applied to incomplete contributor reports filed within the same two-year election cycle in which the contribution was received from the contributor.

* * * *

These were the four elements that the FEC ultimately adopted to define "best efforts." The resulting definition of "best efforts" was *not* a safe harbor outlining a permissible program that would automatically satisfy the statutory provision. Rather, the regulation defined the *only* system that could qualify as "best efforts." If a political committee did not follow the regulation in every detail, down to the exact wording of its requests, it could not be found to have used its "best efforts," no matter how laborious and detailed its efforts to obtain the desired contributor information were.

In explaining the final regulation, the FEC reported that the new definition was intended to address "several concerns that have arisen," but only identified "the low percentage of complete reporting by some political committees" as a specific concern. (App. 43a). It also cited three problem areas existing under the prior definition: the phrasing and location of the request for information, the measures committees took if the requested information did not accompany a contribution, and how the information was to be reported. *Id.*

With respect to the burdens imposed on political committees by the new rule, the Explanation and Justification identified two primary issues: 1) the perceived intrusiveness of the request by contributors and 2) the cost and burden on the committees. (App. 43a). With respect to the former, the FEC concluded that "[concerns over privacy and intrusiveness] must be evaluated in light of

the high priority the FECA places on the public interest in the disclosure of accurate and complete contributor information." *Id.* With respect to the latter concern, the FEC reported that it "[had] made every effort to ensure that costs are reasonable, and [had] attempted to give committees as much flexibility as possible in utilizing the methods they have found to be cost efficient and effective." *Id.*

These two subjects appear to be the only concerns considered by the FEC in detail while promulgating the new best efforts regulation. The FEC never mentioned the First Amendment implications of prohibiting political speech in the governmentally mandated follow-ups. Indeed, *nowhere* in the Notice of Proposed Rulemaking nor the ultimate Explanation and Justification for the rule was there *any* discussion of the potential constitutional concerns created by the new regulation.

THE LEGAL CHALLENGE

Because of the cavalier disregard of First Amendment concerns, and because of the procrustean insistence on a single, rigid definition of best efforts, on May 5, 1994, the Committees filed a challenge against the FEC's new best efforts regulation in the United States District Court for the District of Columbia. The Committees argued that the new rule was contrary to FECA, the Administrative Procedure Act, and the First Amendment. On cross-motions for summary judgment, the district court ruled for the FEC. (App. 35a).

On appeal, the Court of Appeals for the District of Columbia Circuit affirmed in part the lower court's ruling and reversed it in part, with one Judge dissenting. (App. 1a-22a). The majority panel first considered the Committees' claims that the regulation was an unreasonable interpretation of FECA and was arbitrary and capricious or otherwise contrary to the APA. It rejected the Com-

mittees' arguments that § 431(i)'s legislative history precluded the FEC's interpretation, and then considered whether the regulation was a reasonable interpretation of the statute by the FEC. (App. 6a).

The majority panel determined that, while most of the regulation was reasonable, the required statement in initial and follow-up solicitations was not, as it was an inaccurate statement of law. (App. 9a-10a). Because federal law does *not* "require[] political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of $200 in a calendar year," but only requires that they use their "best efforts" to do so, and because the statement might mislead contributors into believing that they were obligated to supply the information, the court struck down the portions of the regulation requiring the statement.[7] *Id.* In doing so, it opined that because the required statement was not mentioned in the Notice of Proposed Rulemaking, that portion of the regulation could be properly severed. (App. 17a). With respect to the remainder of the regulation, the court determined that the FEC's interpretation was reasonable and was not arbitrary and capricious. *Id.*

Because it struck down the required statement, the majority panel only considered the Committees' constitutional challenge with respect to compelling a follow-up

---

[7] As discussed in note 6, *supra*, there is a high degree of ambiguity regarding the effect of the severed regulation. The FEC had at one time maintained that the regulation prevented the inclusion of *any* information in the follow-up other than the required statement and a thank-you. It would thus seem evident that political committees would now be required to make a "clear request" for the information, but would be unable to explain that request to an audience that may view the request as confusing, invasive, or a waste of its previously contributed funds, as the dissenting opinion below noted. (App. 18a-19a). The FEC has not explained whether its statements at oral argument or in its Opposition to Petition for Rehearing control.

request and banning certain speech within that request. The court determined that because, in its view, *Buckley v. Valeo,* 424 U.S. 1, 82-83 (1976), the case that had initially determined the constitutionality of FECA, had sustained mandatory disclosure of the contributor information irrespective of the later-added best efforts provision, any manner in which the FEC chose to define "best efforts" as a lessening of the disclosure requirement would also be constitutional. (App. 15a-16a).

The court also focused on the speech ban itself, and sustained it as a content-neutral time, place, or manner restriction. Stating that because evidence in the administrative record indicated that some committees often buried follow-up requests among other materials, the court concluded that the regulation promoted a significant interest and, because committees could communicate with contributors in other mailings, it likewise left open alternative channels for communication. (App. 16a-17a). Accordingly, the majority panel concluded that the speech ban withstood First Amendment scrutiny. (App. 17a).

The dissent concluded that the regulation's creation of a single method of demonstrating best efforts "unreasonably limit[s] the possible avenues for a political committee to show 'best efforts' to a single format." (App. 22a). The dissent illustrated its point as follows:

> If a political committee sends seven follow-up letters, each proclaiming the prescribed statement in headlined-sized type, but notes in small print in each that the law requires disclosure only from political committees, not political contributors, then the committee has not demonstrated best efforts under [the new regulation]. If a committee sends seventy times seven follow-up letters, but in each asks after the health of the contributor's family, it also has not shown best efforts under the new rule. In either case, the fault is not in the committee—which has done all

> that the statute could have conceivably envisioned—but in the unreasonableness of the rule . . . .

(App. 19a). The dissent further indicated that the misleading nature of the required statement and the FEC's failure to seek comment on it likewise dictated that the FEC had exceeded its discretion in promulgating the rule. (App. 21a). Finally, the dissent stated that it did not perceive anything in the record suggesting that the required statement was severable from the remainder of the rule and thus believed that the majority should have invalidated the entire regulation. (App. 22a).

On April 5, 1996, the Committees petitioned for rehearing and suggested rehearing *in banc* with the appellate court. (App. 79a-91a). The petition was denied, with Judge Sentelle voting to grant the petition. (App. 37a). The suggestion for rehearing *in banc* was likewise denied. (App. 36a). The Committees now seek a writ of *certiorari* because, as the regulation now stands, it unreasonably interprets FECA to define a single meaning for "best efforts" that unconstitutionally infringes on political committees' First Amendment rights.

REASONS FOR GRANTING THE WRIT

To allow the best efforts regulation to remain in effect in its present form is to allow the government unprecedented control over political entities' speech, including the ability to ban portions of such speech based solely on its content. This regulation bans speech that is fundamental to political committees' purposes and speech in which political committees engage on a continual basis. This Court must grant review here in order to preserve core First Amendment rights from unfocused (and unnecessary) government intrusion.

Although *Buckley v. Valeo* burdened speech connected to the political process to the extent necessary to deter corruption and inform the electorate, it did not provide

the Federal Election Commission with carte blanche to control or ban political speech. The FEC and the lower court have refused to acknowledge that the new best efforts regulation unnecessarily muzzles political committees in the interest of speculative, marginal gains in a type of disclosure that Congress has determined is not vital for electoral regulation. In short, the FEC's regulatory "cure" is far worse than the constitutional harm, and should not be permitted by this Court.

The failures of this regulation are further underscored by the inadequacies of the FEC's rulemaking. Despite clear evidence of congressional intent not to require separate follow-up requests where a political committee has made an initial clear request, the FEC adopted just such a requirement. Moreover, the FEC's rule has transformed a flexible statutory concept into a rigid regulatory procedure establishing a single inflexible approach to obtaining desired, but not mandated, disclosure. The new best efforts regulation is thus an unreasonable interpretation of FECA and can be struck down on that ground as well.

This regulation, unsupported and insupportable by either *Buckley* or FECA, imposes heavy financial burdens on political committees (who must rely on voluntary donations) and, at the same time, bans political committees' speech to their core supporters. This Court should grant review of this provision to prevent such infringement of critical constitutional rights.

I. *BUCKLEY v. VALEO* NEVER AUTHORIZED THE UNLIMITED REGULATION OF SPEECH BY THE FEDERAL ELECTION COMMISSION.

The Committees' core constitutional complaint is that the new best efforts regulation impermissibly infringes on their rights to free speech by banning particular speech within the follow-up request for contributor information. The regulation does this in the name of increased dis-

closure of information that contributors are not required to provide, and, indeed, may have affirmatively opted not to provide. The appellate court, rather than focusing on the particular burden on political committees' speech created by this regulation, simply referenced the analysis provided by this Court twenty years ago in *Buckley v. Valeo*, 424 U.S. 1 (1976)—analysis which occurred prior to the enactment of the statute the new regulation purports to implement. While *Buckley* narrowly condoned limited regulation of core political speech, the Court there never authorized the type of needless First Amendment burden this regulation now imposes.[8]

The appellate court dismissed the Committees' constitutional challenge, tersely invoking *Buckley* for the proposition that FECA's disclosure requirements are not inconsistent with the First Amendment. However, while it may be true that *Buckley* acknowledged that disclosure of contributions may deter corruption and promote an informed electorate, it did not state or even imply that all speech rights could be subordinated to those interests.

In *Buckley*, the Court determined that FECA's requirement that political committees disclose the name, address, occupation, and principal place of business for individuals contributing $100 or more per year was constitutional.[9] *Buckley*, 424 U.S. at 68. That require-

---

[8] Indeed, recent reliance on *Buckley* as a grounds for curtailing First Amendment expression has been rejected by this Court. *See Colorado Republican Fed. Campaign Comm. v. FEC*, 59 F.3d 1015, 1024 (10th Cir. 1995), *rev'd*, 116 S. Ct. 2309 (1996) (Supreme Court determined that application of FECA's political party expenditure provisions to party's independent speech expenditures was unconstitutional). Moreover, in that case, one Justice expressed concerns regarding the continuing validity of *Buckley*. *Colorado Republican Fed. Campaign Comm.*, 116 S. Ct. at 2382 (Thomas, J., concurring in the judgment and dissenting in part) (questioning *Buckley*'s approach to campaign finance laws generally).

[9] This threshold later was changed to $200 and name of employer was substituted for principal place of business. 2 U.S.C. §§ 431(13), 434(b)(3) (1980).

ment was eliminated by § 432(i) in favor of a requirement that committees exercise their "best efforts" to obtain and report that information. Thus, *Buckley* never considered the current requirements. More importantly, however, even recognizing that case's acceptance of absolute disclosure, the fact that Congress could constitutionally compel such disclosure does not authorize additional erosion of political committees' First Amendment rights.

Put simply, disclosure of contributor information is one subject and regulation of political committees' speech is another. Merely because disclosure may be required does not mean political committees' speech rights can be disregarded. The appellate court's facile reliance on *Buckley* fails to acknowledge that a speech ban is not simply another tool at an agency's disposal; it is a grave remedy that must be justified on its own terms.

Significantly, this Court recently recognized that distinction in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), when it repudiated the "greater-includes-the-lesser" rationale as expressed in *Posadas de Puerto Rico Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986).[10] There the Court recognized that:

> [t]he text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that . . . speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.

---

[10] The "greater-includes-the-lesser" rationale was this Court's shorthand reference to the theory expressed in *Posadas de Puerto Rico Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986), that because the government could ban casino gambling, it could necessarily ban the advertising of such gambling, a theory the Court subsequently rejected. *See* note 11, *infra*.

44 Liquormart, 116 S. Ct. at 1512 (per Justice Stevens, with three Justices concurring).[11] *See also City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 762-769 (1988) (ability to eliminate underlying activity did not supply authority to regulate speech rights related to that activity). The Court's analysis in those cases is equally applicable here.

Even if *Buckley* supports the notion that 100% disclosure may be constitutional, it does nothing to provide support for the proposition that the FEC can control political committees' speech in order to increase disclosure. In fact, given an explicit Congressional judgment not to mandate 100% disclosure, reliance on *Buckley* is even more tenuous. If the FEC believes greater disclosure is a salutary goal, it may regulate requests for the information in other ways, such as with respect to type-face or placement of the initial request, but it may not resort to the ban of pure speech that its present regulation imposes.[12]

The invidious nature of the speech ban imposed here serves to highlight why this Court has been hostile to such measures in the past. *See McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995) (ban of anonymous campaign literature); *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530 (1980) (ban of billing inserts discussing political matters); *First Nat. Bank of*

---

[11] In the court below, the FEC specifically relied on *Posadas* as providing support for its contention that *Buckley*'s conclusion that contributor disclosure was constitutional supported its regulation through a "greater-includes-the-lesser" rationale. FEC Brief at 37. In *44 Liquormart*, the full Court rejected *Posadas*, albeit on differing grounds. *See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1511, 1522 (1996).

[12] This rejection of *Posadas* and the "greater-includes-the-lesser" argument is consistent with this Court's earlier jurisprudence with respect to speech bans. *See First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (rejecting assertion that, because government could regulate corporate form, it could ban corporate speech).

Boston v. Bellotti, 435 U.S. 765 (1978) (ban of corporate speech on political issues). Pursuant to this regulation, in a communication made at a political committee's own expense to its core supporters, a political committee may not:

1) urge support for a particular candidate or issue, (*i.e.*, "Vote for Candidate Smith.");

2) request additional funds so that it can engage in further political activities (*i.e.*, "Give so that we can promote tax reform.");

3) solicit funds to cover the costs of compliance with the FEC's regulation (*i.e.*, "Please help us pay for the cost of this request which the government requires us to make by giving us another voluntary contribution.").

Clearly, this regulation imposes a severe restriction on core political communication, to a degree beyond any ever permitted, or even contemplated, by *Buckley v. Valeo*.[13]

II. THE FEDERAL ELECTION COMMISSION CANNOT JUSTIFY THE SPEECH PROHIBITION IMPOSED BY THE BEST EFFORTS REGULATION.

As *Buckley* did not decide the constitutional issue presented by the FEC's regulation, the new best efforts regulation must survive constitutional scrutiny on its own merits, but it cannot do so. This rule is a direct, content-based ban of pure speech, and, as such, it must be narrowly tailored to serve a compelling state interest. *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530, 541 (1980).

---

[13] In the commercial speech context, the Court has ruled that the government may not bar brewers from displaying the alcohol content of their beers. *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995). It is thus striking to consider that, while information on beer labels cannot be banned, the FEC believes that political committees' speech to their supporters at their own expense can be.

A. The Best Efforts Regulation Is Content-Based.

Although the appellate court relied on its misreading of *Buckley* to reject the Committees' constitutional arguments, it also considered the speech ban in the required follow-up inquiries on its own terms. The court analyzed the speech ban as a content-neutral time, place, or manner restriction because the regulation "forbids additional speech not because of any hostility to content . . . but to ensure that a written request for the information is not overlooked." (App. 16a).[14]

This analysis ignores the plain effects of the regulation. It does not ban all speech, it bans selected speech, allowing the request for information and a "thank-you" but banning everything else precisely because it does not pertain to missing information, as demonstrated above (at 17). Simply because the FEC may not intentionally be suppressing whatever else political committees may wish to say is not sufficient to render the ban content-neutral. This Court came to that exact conclusion in *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995), where it considered a state statute banning anonymous campaign literature. The Court concluded that "even though the provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of the speech" because the category of covered speech was defined by content (campaign literature) and because it compelled certain content in such speech (the writer's name and address). *McIntyre*, 115 S. Ct. at 1518.

The best efforts regulation is strikingly similar to the content-based regulation at issue in *McIntyre*. It compels certain content (a request for contributor information in solicitations and a separate follow-up request again ask-

---

[14] The district court did not view the regulation as content-neutral. Thus, the district court analyzed the regulation as requiring narrow tailoring and a compelling interest. (App. 32a).

ing for the information), permits other content (a "thank you" and possibly some explanation of the request[15]), and bans all other speech (any other communication). The regulation's basic operation is explicitly premised on content, dictating the higher standard of strict constitutional scrutiny. *Simon & Shuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991) (content-based regulation requires "compelling state interest . . . narrowly drawn to achieve that end"); *Consolidated Edison*, 447 U.S. at 541 (same).[16]

B. The FEC Can Show No Compelling Interest Supporting Its Regulation.

As the FEC never considered the constitutional implications of the best efforts regulation, the only interest that has been asserted to defend the rule is that promoted by the agency's counsel in the proceedings below, *i.e.*, increasing disclosure.[17] That interest, however, is not supported by the new regulation.

---

[15] See notes 6 & 7, *supra*.

[16] An additional reason that this regulation is not content-neutral is that it is only directed at political speech, although the regulation does not expressly acknowledge that fact. However, political committees, created pursuant to FECA, have no other purpose than furthering political ends—it is the *sine que non* of their existence, as the FEC well knows. While the regulation may operate against all speech, the ban occurs in a forum for pure political speech, and thus the regulation actually focuses the ban on political speech. Accordingly, as the Court recognized in *McIntyre*, the regulation must be subject to searching constitutional review. *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1519 (1995) (laws burdening political speech subject to "exacting scrutiny").

[17] The FEC had a duty to consider these serious First Amendment considerations during the rulemaking itself. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (regulation arbitrary and capricious where agency "entirely failed to consider an important aspect of the problem").

Regardless of whether Congress could constitutionally compel 100% disclosure of contributor information, FECA contains no such requirement. Congress has never required contributors to provide the information, and has explicitly determined that political committees' may accept contributions without having the information. *See* 2 U.S.C. § 432(i). The disclosure here is not the general disclosure sanctioned by *Buckley*; it is limited disclosure of information that contributors have a right to withhold and that they may have already chosen to withhold. While the state may have an interest in increased disclosure overall, the fact that Congress chose not to require this information plainly reveals its judgment that such interest is not compelling.[18]

C. The Best Efforts Regulation Is Not Narrowly Tailored.

Even if any marginal increase in disclosure could be characterized as compelling, the FEC regulation is still unconstitutional because it is not tailored to achieve its end. Put simply, there are too many alternatives through which the FEC could reasonably increase disclosure without resorting to an outright ban on political committees' speech in communications paid for by the committees to their core supporters.

If the FEC is concerned that contributors may overlook political committees' requests for information, it may determine to regulate the type-face or the placement of those requests, options it did rely on to some extent in the new regulation with respect to defining what constituted a "clear and conspicuous" request. *See* 11 C.F.R. § 114.7 (b)(1) (App. 104a). Presumably the FEC did so be-

---

[18] In fact, when the Explanation and Justification (App. 46a) for the regulation is read closely, the FEC's actual interest is reducing clutter allegedly caused by additional committee speech in follow-up requests, an interest rejected by this Court as justifying a speech ban imposed on use of residential signs. *See City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2045 (1994).

cause such minimal requirements would increase disclosure among those contributors who did not choose to withhold information, but simply failed to notice the request.[19]

Requiring bold-faced type or prominently displayed requests, however, is a far cry from the intense regulation of speech the best effort regulation now mandates. As discussed above (at 15-17), speech bans are a draconian measure permissible only in particularly narrow circumstances. The FEC simply has too many other tools at its disposal and the increased disclosure itself is too marginal to justify stifling political committees' speech in communications made at their own expense. As this Court has stated:

> Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify [that which] diminishes the exercise of rights so vital to the maintenance of democratic institutions.

Metromedia, Inc. v. San Diego, 453 U.S. 490, 519-20 (1990) (per Justice White, with three Justices concurring) (quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)); *see also City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2045 (1994) (cautioning against laws that foreclose broad mediums of expression because "such measures can suppress too much speech"). The FEC should rely on those methods that it has determined will increase disclosure that do not intrude on political committees' speech rights rather than resort to such a blunt, overbroad method of advancing its speculative ends.

* * * *

---

[19] Indeed, because contributors have the right never to provide all the requested information, the FEC is imposing this burden on highly speculative, and therefore suspect, grounds. *See Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2394 (1996) (restrictions on speech are overly restrictive where they "sacrific[e] important First Amendment interests for too speculative a gain" (internal citations omitted)).

Thus, as shown above, the best efforts regulation fails constitutional scrutiny. It is a content-based regulation banning pure speech, which is neither supported by a compelling interest nor narrowly tailored to that interest.[20] Acordingly, it is an unconstitutional abridgment of political committees' First Amendment rights, and must be struck down.

III. THE BEST EFFORTS REGULATION IS CONTRARY TO THE FEDERAL ELECTION CAMPAIGN ACT.

The court below, following the analysis set out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), determined that the FEC's definition of "best efforts" was not contrary to FECA and was, for the most part, a reasonable interpretation of the statute.[21] The FEC's regulation, however, is precluded both by the congressional intent regarding § 432(i) and by the unreasonable requirements imposed by the regulation. Accordingly, even without consideration of its constitutional infirmities, the regulation should be set aside.

---

[20] Even applying the appellate court's content-neutral analysis of the speech ban, the regulation fails. First, the regulation is not narrowly tailored, as previously explained. Second, there is no alternative channel that effectively allows committees to explain the additional request for information (if such explanation is indeed banned) or ask that the contributor help defray the costs of such additional request(s). There simply is no effective alternative channel for this type of speech. *City of Ladue*, 114 S. Ct. at 2047 (time, place, or manner restrictions must leave open other effective channels for speech). Of course, any alternative channel of communication, whether effective or ineffective, would be at additional expense needlessly imposed.

[21] As discussed above in note 4, the appellate court determined that the required statement failed the second step of the *Chevron* analysis as an unreasonable construction of the statute. (App. 10a).

A. Congressional Intent Precludes The FEC's Current Definition Of "Best Efforts."

In 1980, when the FEC adopted the original best efforts regulation, the agency relied extensively on House Report 422 as an expression of congressional intent with respect to § 432(i) and the other 1979 amendments to FECA. *See* 1980 FEC Transmittal of Regulation, 45 Fed. Reg. 15,080 (citing H.R. Rep. No. 422, 96th Cong., 1st Sess. (1979)) (App. 60a-63a).[22] Following that guidance, the FEC adopted the original best efforts regulation requiring only a single clear request for contributor information in solicitations, without any mandatory follow-up requirement or speech ban. In doing so, the FEC abandoned its earlier proposal, which had required a discrete follow-up effort. *See* 1980 FEC Notice of Proposed Rulemaking, 45 Fed. Reg. 5,546, 5,560 (1980). App. 64a-66a). The stated reason for the change was reliance on the House Report, which provided:

> If the committee made an effort to obtain the information in the initial solicitation and the contributor ignored the request, the Commission should not require the committee to make the same request two, three, or four times. On the other hand, if the best efforts test is not met, the committee must be required to take corrective action, such as contacting the contributor and requesting the information.

H.R. Rep. No. 422, 96th Cong., 1st Sess. 14 (1979). The agency clearly considered this as guiding legislative intent when it enacted the regulation, and there is no reason why it should not remain so now. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 413 (1993) (administrative agency's contemporaneous construction of statute is "of particular relevance" to determining its meaning).[23]

---

[22] House Report 422 functioned as the conference report for the 1979 amendments to FECA.

[23] The majority panel below dismissed House Report 422 as post enactment legislative history because the term "best efforts" was

There is thus clear evidence that Congress did not intend to require multiple requests for contributor information and was satisfied with a single, clear request accompanying each solicitation. *See* 11 C.F.R. § 104.7 (1980) (original regulation mandated single, clear request). *Chevron* specifically recognizes that administrative constructions that are contrary to clear congressional intent cannot stand. *Chevron*, 467 U.S. at 843 n.9. *See also FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (congressional intent must control interpretation of statute). Accordingly, the FEC's current interpretation mandating separate follow-up requests is contrary to the first step of the *Chevron* analysis, and its regulation must fail.[24]

This conclusion is further necessitated by the grave constitutional concerns created by the FEC's definition of "best efforts." Its construction of the statute plainly infringes on the First Amendment rights of political committees, despite a range of other interpretations that would not do so. In rejecting various permissible interpretations in favor of one so rife with constitutional objections, the agency's actions merit no deference from this Court. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg.*

---

used in an earlier section of FECA, § 434(b). That section, however, imposed different requirements regarding disclosure and was repealed in 1979. The 1979 legislative history is thus the history related to the "best efforts" requirement now in effect under § 432(i). *See* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1976 & Supp. 1979).

[24] Irrespective of whether House Report 422 was an accurate statement of congressional intent, the FEC clearly viewed it as controlling in 1980 and thus the agency had a duty to explain why it was no longer expressive of congressional intent in 1993. The FEC provided no such explanation, and so its rulemaking was arbitrary and capricious and should be set aside on those grounds as well. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (agency must supply a "reasoned analysis" when "changing its course").

& Const. Trades Council, 485 U.S. 568, 575-77 (1988) (courts should construe statutes to avoid serious constitutional problems).

B. The FEC's Interpretation Of "Best Efforts" Is An Unreasonable Interpretation Of § 432(i).

Even if the agency's interpretation were not contrary to the clear congressional intent, it would still be impermissible under the *Chevron* analysis as an unreasonable interpretation of the statute. A straight-forward reading of § 432(i) suggests that different political committees should be able to engage in a range of activities to show that they have exercised their individual "best efforts" at obtaining contributor information. It is thus unreasonable for the FEC to declare that only strict adherence to one selected format will qualify as a political committee's best efforts, as Judge Sentelle's dissenting opinion below made clear. (App. 19a). Committees of different sizes and ideologies use a variety of methods to obtain contributor information, and have varying results when using the same methods, as the evidence received by the FEC during its rulemaking shows.[25] The FEC's regulation refuses to acknowledge these differences or to allow committees to take advantage of methods they might have found to be peculiarly effective in the past—in fact, its regulation may encourage committees using more effective methods to forsake them to avoid additional costs beyond those imposed by the regulation.

The absurdity of the FEC's regulation was illustrated clearly by Judge Sentelle, who noted that the regulation would dictate that a committee asking about the health of

---

[25] The reference to ideology reflects that some committees' entire support base may be comprised of individuals who find the request for information itself to be overly intrusive, further complicating these committees' efforts to maximize disclosure. The FEC received evidence to this effect from other political organizations during the rulemaking. (App. 43a).

a contributor in its follow-up request could not have exercised its "best efforts" despite any other efforts it undertook. (App. 19a). Similarly, the regulation would preclude committees from sending contributors copies of FECA in the follow-up requests in an effort to apprise them fully of their rights (or, for that matter, a copy of the First Amendment).[26] This regulation is simply a far-fetched bureaucratic edict that has no reasonable relation to the statutory purpose and such administrative over-reaching should be reviewed and rejected by this Court.

CONCLUSION

For the reasons set forth above, the Committees respectfully request that this Court grant their petition for *certiorari*.

Respectfully submitted,

JAN WITOLD BARAN
Counsel of Record
JASON P. CRONIC
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Counsel for
Republican National Committee,
the National Republican
Senatorial Committee, and
the National Republican
Congressional Committee

September 9, 1996

[26] The FEC conceded at oral argument that the regulation would prohibit including a copy of FECA in a follow-up request. (App. 100a-101a).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 14, 1995 Decided February 20, 1996

No. 94-5248

REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN SENATORIAL COMMITTEE and NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE,
Appellants

v.

FEDERAL ELECTION COMMISSION,
Appellee

Appeal from the United States District Court
for the District of Columbia
(No. 94cv01017)

Before: EDWARDS, *Chief Judge*, SENTELLE and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* SENTELLE.

TATEL, *Circuit Judge*: At issue in this appeal is a Federal Election Commission regulation interpreting what poliitcal committees must do under the Federal Election Commission Act to demonstrate that they have exercised their "best efforts" to encourage donors to disclose certain personally identifying information. For more than a dec-

ade, the Commission considered a political committee to have exercised "best efforts" if the committee made a clear request for the information in its initial solicitation for funds. Concerned about low reporting rates, the Commission issued the regulation that is the focus of this appeal. This new regulation requires political committees to send a follow-up request to donors who fail to supply the information in response to the original solicitation; requires the inclusion of a statement that federal law requires political committees to report the information to the FEC; and prohibits committees from including in the follow-up request any material other than the request for the information, the mandatory statement, and an expression of graittude for the contribution. Finding the new regulation not contrary to the Act, arbitrary or capricious, or inconsistent with the First Amendment, the district court granted summary judgment for the Commission. We agree with the district court as to the requirement of a stand-alone follow-up request. Because the language of the mandatory statement is inaccurate and misleading, however, we conclude that this portion of the regulation is contrary to the statute.

I.

The Federal Election Commission Act, first enacted in 1971, requires the treasurer of a political committee to report to the Federal Election Commission the name, address, occupation, and employer of donors giving more than $200 in a single year. 2 U.S.C. §§ 431(13), 434 (b)(3)(A) (1994). Neither the Act nor any other law, however, requires donors to disclose this information.

In *Buckley v. Valeo*, 424 U.S. 1, 60-84 (1976), the Supreme Court upheld the political committee reporting requirement against a First Amendment challenge. Applying "exacting scrutiny," *id.* at 64, the court sustained the requirement as "appear[ing] to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist," *id.* at 68.

In 1976, Congress amended the Act by adding the following provision:

> When committee treasurers and candidates show that *best efforts* have been used to obtain and submit the information required by this subsection, they shall be deemed to be in compliance with this subsection.

Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, 480 (formerly codified at 2 U.S.C. § 434(b) (1976)) (emphasis added). Congress did not define the term "best efforts"; nor did it do so three years later when it recodified the "best efforts" provision, deleting "candidates" as persons to whom the provision applied, but leaving the remaining language essentially intact. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339, 1347 (formerly codified at 2 U.S.C. § 432(i) (1976 & Supp. 1979)).

Soon after the 1979 amendments became effective, the Commission issued a regulation that for the first time interpreted "best efforts." 11 C.F.R. § 104.7 (1981 ed.). According to the regulation, if a political committee failed to report identifying information for a contributor whose gifts exceeded the $200 annual threshold, the committee could satisfy the "best efforts" provision by showing that its original solicitation, whether written or oral, included "a clear request" for the information that "inform[ed] the contributor that the reporting of the information is required by law." § 104.7(b).

Over a decade later, dissatisfied with the extent to which political committees were obtaining the requested information from contributors, the Commission gave notice that it intended to revise and strengthen the 1980 "best efforts" regulation. 57 Fed. Reg. 44, 137 (1992). After public comment and hearing, the Commission issued a regulation providing that political committees

would "only be deemed to have exercised best efforts" if, in addition to their request in the initial solicitation, they made a separate follow-up request to those contributors not disclosing all the information. *See* 58 Fed. Reg. 57,725, at 57,729 (Oct. 27, 1993) (codified at 11 C.F.R. § 104.7(b) (1994)). The new regulation provides that the follow-up request, like the request in the original solicitation, can be either oral—if documented in writing—or written. 11 C.F.R. § 104.7(b)(2). Both the original solicitation and the follow-up request must include, in a "clear and conspicious manner," the following statement:

> Federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of $200 in a calendar years [sic].

11 C.F.R. § 104.7(b)(1)-(2). According to the regulation, the follow-up request may not contain anything other than the request for the missing information, the mandatory statement, and an expression of gratitude. The new regulation became effective on March 3, 1994.

Presenting both statutory and constitutional arguments, the Republican National Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee—the primary political committees of the Republican Party at the national level—challenged the Commission's new regulation in the United States District Court for the District of Columbia. They claimed that the plain language and legislative history of the "best efforts" provision, as well as the Commission's previous interpretations of it, made clear that Congress intended to require no more than one request for the identifying information. Arguing that the Commission had failed to give a reasoned explanation for its new regulation, the Committees challenged it as arbitrary and capricious in violation of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A) (1994). The Committees also argued that the mandatory statement, the prohibition of additional "speech" in the follow-up request, and the

regulation's alleged financial and administrative burdens, violate the First Amendment.

The district court granted summary judgment for the Commission. It found the regulation consistent with the Act and adequately justified by the Commission. *Republican Nat'l Comm. v. Federal Election Comm'n,* No. 94-1017, slip op. at 7-10 (D.D.C. July 22, 1994). Relying on *Buckley v. Valeo,* the district court also rejected the Committees' First Amendment challenges, finding the regulation narrowly tailored to achieve the compelling interest of disclosing information about political contributors. *Id.* at 10-14. Repeating the arguments they advanced in the district court, the Committees appeal.

II.

The Committees' challenge to the regulation as contrary to the language, purpose, and legislative history of the "best efforts" provision of the Act presents us with a typical *Chevron* issue. *Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Using "traditional tools of statutory construction," we first examine whether the statute "directly [speaks] to the precise question at issue." *Id.* at 842 & n.9. If so, we follow the statute's instructions. If the statute "has not directly addressed the precise question at issue," we defer to the agency's interpretation if it is reasonable. *Id.* at 843.

We note at the outset that the Committees do not challenge the Commission's authority to issue regulations defining "best efforts," and with good reason: the statute clearly authorizes the Commission to issue implementing regulations. 2 U.S.C. § 438(a)(8); *see also Federal Election Comm'n v. Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 37 (1981) (noting the FEC's broad rulemaking authority). Although the Commission certainly could have chosen to judge "best efforts" on a case-by-case basis, we have no doubt that it is equally authorized to interpret the term through rulemaking. *See New York*

State Comm'n on Cable Television v. FCC, 749 F.2d 804, 813 (D.C. Cir. 1984) ("The decision whether to proceed by rulemaking or adjudication lies within the [agency's] discretion.").

Beginning with the statute's language, as we do in all *Chevron* cases, we find nothing in the phrase "best efforts" to preclude the Commission from requiring committees to make more than one request for the information. Inherently general and open-ended, the phrase "best efforts" is well-suited for administrative refinement. Had Congress intended to limit the Commission to requiring a single request, it certainly could have made this clear.

The Committees claim to find the requirement of a single request in the Act's legislative history. They point to a report of the Committee on House Administration accompanying the 1979 amendments. Noting that "[t]he best efforts test is crucial since contribution information is voluntarily supplied by persons who are not under the control of the committee," that report advises:

> If the committee made an effort to obtain the information in the initial solicitation and the contributor ignored the request, the Commission should not require the committee to make the same request two, three, or four times. On the other hand, if the best efforts test is not met, the committee must be required to take corrective action, such as contacting the contributor and requesting the information.

H. Rep. No. 96-422, 96th Cong., 1st Sess. 14 (1979). According to the Committees, this language proves that Congress intended to limit the Commission to requiring a single request. We disagree. For one thing, because the 1979 "best efforts" provision carried over the 1976 provision without substantial change, the House report is essentially post-enactment history, carrying little probative weight. *See Democratic Congressional Campaign v. Federal Election Comm'n*, 831 F.2d 1131, 1134 (D.C. Cir. 1987) (discounting floor statements regarding judicial re-

view provisions of Federal Election Commission Act Amendments of 1979 in part because the provisions "carried over without substantive change" an earlier provision). Moreover, the report never defines "best efforts." Although referring to "an effort . . . in the initial solicitation," it fails to say whether that effort satisfies the "best efforts" test. While stating that the Commission should not require a committee to make the "same request" repeatedly, the report goes on to state that "if the best efforts test is not met, the Committee must be required to take corrective action, such as contacting the contributor and requesting the information." The report is thus insufficiently clear to limt the open-ended phrase "best efforts" to a single request.

Nor do we find support for the Committees' argument in the legislative history of the original 1976 Act. When introducing the "best efforts" provision, the sponsoring senator said only that it was an "anti-nit-picking amendment," which "merely says that if a finding is made that they tried in good faith to try to comply with the law they shall not be harassed." 122 Cong. Rec. 7922-23 (1976) (statement of Sen. Packwood). Stating that a "good faith effort" is "not quite enough," the same senator explained that "[y]ou cannot use the standard, 'I did not know because I did not ask.'" *Id.* Nothing in these statements limits "best efforts" to a single request.

Relying on comments of several FEC Commissioners during a meeting on the proposed 1980 regulation, the Committees next argue that the Commission itself interpreted "best efforts" to allow no more than one clear request. The Committees point out that in that meeting, the Commission, abandoning a proposal to require a follow-up request, decided instead to require only one request in the initial solicitation. According to the transcript of the meeting, some Commissioners believed that a single initial request would respond to Committee staff concerns. But whether these Commissioners thought the statute *mandated* only one request, or even whether their views were

shared by other Commissioners, is not at all clear. In the end, however, none of this is relevant because even if in 1980 the Commission had interpreted the House Report to require only one clear request, such an interpretation would not bind us for purposes of *Chevron* step-one analysis. *Cf. International Bhd. of Elec. Workers v. NLRB,* 814 F.2d 697, 707-08 (D.C. Cir. 1987) (holding that court need not sustain agency interpretation that was based, not on agency's judgment, but on its erroneous interpretation of statute).

Thus unpersuaded by the Committees' *Chevron* step-one arguments, we next ask whether the Commission's interpretation of "best efforts" is reasonable "in light of the language, legislative history, and policies of the statute." *Natural Resources Defense Council v. United States EPA,* 822 F.2d 104, 111 (D.C. Cir. 1987); *see also Chevron,* 467 U.S. at 843. Examining again the statute and its legislative history, we find no basis for questioning the reasonableness of requiring a stand-alone follow-up request. As we have already concluded, nothing in the statute or its legislative history limits the Commission to requiring a single request, or precludes the Commission from requiring a follow-up. The Commission adopted the regulation to further the Act's purposes: gathering donor information to inform the electorate of the sources of campaign money and to deter corruption. *See Buckley,* 424 U.S. at 67-68. Finding that political committees were not collecting sufficient data, the Commission concluded that an uncluttered follow-up request would yield more information. Although the Commission's interpretation of "best efforts" to permit a stand-alone follow-up requirement is not "the only plausible one," *Natural Resources Defense Council,* 822 F.2d at 117, it reflects a reasonable reading of the statute.

We are equally unpersuaded by the Committees' argument that the follow-up request is unreasonable because, for more than a decade, the Commission had consistently required only one clear request. As the Court stated in

Chevron, "[a]n initial agency interpretation is not instantly carved in stone." 467 U.S. at 863. "[T]o engage in informed rulemaking," the Court observed, an agency "must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64. That is exactly what the Commission did here. The mere fact that the Commission changed the prior regulation does not make the new regulation an unreasonable construction of the statute.

We reach a different conclusion as to the regulation's mandatory statement. The required language—that "[f]ederal law requires political committees to report the name, mailing address, occupation and name of employer for each individual" contributing more than $200 a year—is inaccurate and misleading. The statute does *not* require political committees to report the information for "each" donor. It only requires committees to use their *best efforts* to gather the information and then report to the Commission whatever information donors choose to provide. Moreover, because the regulation requires committees to use the mandatory statement to satisfy the "best efforts" standard, the statement's inaccuracy could produce unreasonable and wholly unauthorized results. If instead of sending out the mandatory statement, for example, a political committee used a more accurate explanation of the law—such as, "federal law requires us to use our best efforts to collect the information"—or even a direct quote from the statute, the Commission would presumably find the committee not to have exercised its "best efforts." We simply do not believe that Congress authorized the Commission to forbid political committees from accurately stating the law.

The mandatory statement suffers from a second, related defect: its inaccurate characterization of the law may lead unsuspecting donors to believe that they *must* supply the requested information. Federal law, however, does *not* so require. The law only requires political committees to *ask* donors for the information; no federal law requires *donors*

to report their name, address, occupation, and employer as a condition of supporting the political party of their choice. Although the mandatory statement's language may well produce higher reporting rates, we doubt that Congress authorized the Commission to accomplish this purpose by misleading donors. The mandatory statement is thus unreasonable and contrary to the statute.

III.

In addition to their *Chevron* arguments, the Committees challenge the "best efforts" regulation as aribtrary and capricious in violation of the Administrative Procedure Act. Because we have already invalidated the mandatory statement, we focus here on the Committees' challenge to the stand-alone follow-up request. Echoing their *Chevron* arguments, the Committees contend that the Commission reversed its long-standing interpretation without providing a reasoned explanation.

Because the Commission changed its regulation, our task is to determine whether the Commission based its new regulation on "reasoned analysis." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983). Our inquiry here overlaps somewhat with our *Chevron* step-two analysis. *See Arent v. Shalala*, 70 F.3d 610, 616 n.6 (D.C. Cir. 1995) ("[W]hether an agency action is 'manifestly contrary to the statute' is important both under *Chevron* and under *State Farm*."). At the same time, however, a permissible statutory construction under *Chevron* is not always reasonable under *State Farm:* "we might determine that although not barred by statute, an agency's action is arbitrary and capricious because the agency has not considered certain relevant factors or articulated any rationale for its choice," *Arent*, 70 F.3d at 620 (Wald, J., concurring in the judgment). Although we may not substitute our judgment for the Commission's, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), we consider whether the agency has "examin[ed] the relevant data and

articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,' " *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Not "particularly demanding," this requirement is satisfied if the agency " 'enable[s] us to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.' " *Public Citizen, Inc. v. Federal Aviation Admin.*, 988 F.2d 186, 197 (D.C. Cir. 1993) (second alteration in original) (quoting *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)).

With these principles in mind, we examine the Commission's justification for its new regulation. Our starting point is the Commission's initial request for public comment on its proposal to require a "separate and distinct" follow-up request "with an accompanying notice of the reporting requirement." 57 Fed. Reg. at 44,137-38. According to the notice of proposed rulemaking, the Commission felt that strengthening the "best efforts" regulation was necessary because "weaknesses in the current . . . regulations appear to have led to a significant percentage of incomplete itemizeable contributions for some committees." *Id.*

Fourteen groups, including the RNC, submitted written comments on the proposed regulation; six witnesses, again including the RNC, testified at a public hearing; and the Commisison surveyed 200 randomly selected committees, each having at least forty donors contributing in excess of $200 per year. Responses were mixed as to the efficacy of the proposed regulation, its cost and burden, and the Commission's statutory authority to change the rules. Several witnesses and commentors shared the Commission's concern about low levels of donor compliance. One group claimed that the political committees of the 1992 Republican and Democratic presidential candidates failed to report information for "well over half of their large individual contributions." Another group claimed that

"millions of dollars in campaign contributions pass through the system undocumented."

Witnesses disagreed about both the cause of low donor response rates and the appropriate solution. According to several witnesses, low donor response rates were the responsibility of political committees who either lacked the will to collect the information or whose efforts were entirely inadequate. The RNC acknowledged that "it may well be that some campaigns make a more serious effort to achieve a higher degree of compliance than others." One witness revealed that some committees put their requests for donor information in small print, or buried them among other material. Another testified that it had increased the number of donors providing identifying information from 30 percent to about 67 percent by making follow-up requests. At least two groups urged the Commission to go beyond a follow-up request and require political committees to return all contributions lacking the required information with a request that donors resubmit the contribution with the identifying information.

Not all witnesses thought that political committees were responsible for low response rates. One witness testified that low rates stemmed from resistance by contributors. This witness urged the Commission to direct political committees to emphasize that the statute required the reporting of donor information. Agreeing that resistance by contributors was the problem, other groups argued that the proposed regulation would not substantially increase response rates.

Survey responses were equally mixed. Twenty-six of seventy-four respondents listed follow-up phone calls "solely devoted to obtaining the missing information" as their most successful method for obtaining donor information. Twenty-five of seventy-four listed follow-up letters solely devoted to obtaining the information as most successful. At the same time, twenty-one of seventy-four respondents listed follow-up letters solely devoted to obtaining the information as *least* successful.

Assessments of the costs of compliance also conflicted. Several witnesses were concerned about the staff time, resources, and money required to comply. The RNC estimated $5 to $6 for each follow-up request. By comparison, another witness estimated "at least 50 cents per letter." Nineteen of seventy-four survey respondents felt that a stand-alone follow-up phone call would impose an "unreasonable expense"; fourteen said that a stand-alone follow-up letter would be unreasonable.

In its testimony and written comments before the Commission, the RNC argued, as it does here, that the proposed "best efforts" regulation exceeded the Commission's statutory authority. Others disagreed, arguing that nothing in the statute or its legislative history prohibited the follow-up requirement.

Following the comment period and the public hearing, the Commission published its new regulation, explaining that "[a]fter careful consideration of the full legislative history," it had concluded that the statute does not "preclude [the Commission] from requiring that committees take additional measures when the information . . . is not forthcoming." 58 Fed. Reg. at 57,728. Stating that it had "weighed . . . the cost, burdensomeness, and effectiveness of various modifications to the regulations," the Commission concluded that the new regulation would impose minimal burdens. *Id.* at 57,726.

Based on the evidence before the Commission—that certain political committees had low reporting rates, that an uncluttered follow-up request would encourage greater disclosure, and that compliance costs were not unreasonable for most committees—we find that the Commission's requirement of a stand-alone follow-up request resulted from reasoned analysis. We have no trouble seeing "what major issues of policy were ventilated" or why the Commission "reacted to them as it did." *Public Citizen*, 988 F.2d at 197. We are equally satisfied that the Commission's discussion of the legislative history adequately re-

sponded to the RNC's challenge to the Commission's authority to promulgate the new regulation. Because the Commission had adequate justification for its new regulation, the fact that some groups opposed the follow-up request does not, as the Committees argue, render the requirement arbitrary and capricious. In the end, the Commission's new regulation results from exactly the kind of agency balancing of various policy considerations to which courts should generally defer. *See Hinton v. National Transp. Safety Bd.*, 57 F.3d 1144, 1151 (D.C. Cir. 1995). Congress gave the Federal Election Commission, not this court, responsibility for determining the most effective techniques for obtaining donor information.

We turn finally to the Committees' argument that we should construe the statute to invalidate the Commission's stand-alone follow-up requirement in order to avoid what they argue are "substantial" First Amendment questions. Committees' Brief at 32. Their argument rests on the proposition that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991). This canon of statutory construction is based on "the prudential concern that constitutional issues not be needlessly confronted," *DeBartolo Corp.*, 485 U.S. at 575, and on "respect for Congress, which we assume legislates in light of constitutional limitations," *Rust*, 500 U.S. at 191.

We applied this canon most recently in *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600, 604-05 (D.C. Cir. 1995). That case involved a challenge to an FEC regulation defining the term "members" for purposes of political communications and solicitations by membership organizations. Finding that the Commission's regulation presented "grave constitutional issues,"

id. at 604, we declined *Chevron* deference. We think the present case is quite different. Because we can easily resolve the Committees' First Amendment challenges through the application of controlling precedent (see Section IV below), we do not face the sort of serious constitutional questions "that would lead us to assume Congress did not intend to authorize [the regulation's] issuance." *Rust*, 500 U.S. at 191.

IV.

The Committees focus their First Amendment arguments primarily on the mandatory statement that we have already invalidated. We thus consider only their First Amendment challenge to the stand-alone follow-up request. According to the Committees, this requirement burdens constitutionally-protected political solicitation by forcing them to incur additional costs to send out additional messages.

The simple answer to the Committees' argument is *Buckley*'s holding that the Act's disclosure requirements are not inconsistent with the First Amendment. 424 U.S. at 82-83. The Supreme Court considered the important privacy and association rights at stake for donors, acknowledged that "public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute," and held that the disclosure requirements were "the least restrictive means" of furthering the substantial government interests in informing the electorate on the sources of campaign money, deterring corruption, and detecting violations of the Act's contribution limitations. *Id.* at 67-68. Indeed, because the "best efforts" provision—added to the Act after the Court decided *Buckley*—essentially offers an optional safe harbor or affirmative defense for political committees unable to secure the identifying information, it actually makes the Act's reporting requirements less stringent than the absolute disclosure requirements upheld in

Buckley. As the district court explained, "the 'best efforts' regulation does not compel political committees to do anything, and there is no penalty for violation of the 'best efforts' regulation." *Republican Nat'l Comm.*, No. 94-1017, slip op. at 11. Because the absolute disclosure requirement at issue in *Buckley* does not violate the First Amendment, neither can an optional safe harbor for those unable to comply with the absolute disclosure requirement.

The Committees nevertheless argue that the restriction on additional speech is content-based and not narrowly tailored to the interests identified in *Buckley*. To determine whether the regulation is content-based (in which case we would apply strict scrutiny) or content-neutral (in which case we would apply intermediate scrutiny) we ask whether "the government has adopted a regulation of speech because of disagreement with the message it conveys," or "whether the regulation . . . serves purposes unrelated to the content of expression." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)). Applying this standard, we conclude that the Commission's 1994 regulation is content-neutral. It forbids additional speech not because of any hostility to the content of that speech, but to "ensure that a written request for the information is not overlooked." 58 Fed. Reg. at 57,727.

Content-netural regulations are valid if they are " 'narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' " *United States v. Grace*, 461 U.S. 171, 177 (1983) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The Commission's regulation satisfies this standard. The administrative record identifies as one cause of low donor response rates the burying of requests for donor information among other material. Because the regulation prohibits that prac-

tice, we are satisfied that it promotes the very gathering of information that *Buckley* found to be in the public interest.

The regulation also leaves political committees free to express their views to donors in other communications. Even at the Committees' estimate of up to $6 per follow-up request, the cost is only about three percent of a $200 contribution, an amount not likely to inhibit political committees from "speaking." We agree with the district court that "such a minimal burden is not unconstitutional in light of *Buckley's* recognition of the strong governmental interest involved." *Republican Nat's Comm.*, slip. op. at 13. *Buckley* itself upheld the Act's reporting requirements, despite the Court's recognition that these requirements would financially burden campaigns by deterring some donors from contributing. *Buckley*, 424 U.S. at 68. Thus, prohibiting political committees from including additional information in their follow-up requests does not violate the First Amendment.

V.

Because the Commission's initial proposed regulation did not even include the requirement of a mandatory statement, *see* 57 Fed. Reg. 44,137, we have little doubt that the regulation is severable. *See North Carolina v. Federal Energy Regulatory Comm'n*, 730 F.2d 790, 795-96 (D.C. Cir. 1984) (remand proper when "there is substantial doubt" as to whether the agency intended its regulation to be severable). Accordingly, as to the regulation's requirement of a stand-alone follow-up request, we affirm the district court's grant of summary judgment to the Commission. As to the mandatory statement, we reverse and remand with instructions to enter summary judgment for the Committees.

So ordered.

SENTELLE, *Circuit Judge, concurring in part and dissenting in part*: Although I agree with most of the majority's analysis, I write separately because I reason somewhat differently, and more importantly, because I cannot agree with the majority's conclusion that the "stand alone" portion of the regulation can be served and saved. First, I agree with the majority that the Commission's interpretation of the Act falls as unreasonable under *Chevron* analysis, but I would also strike the regulation as arbitrary under the Administrative Procedure Act.

1. *Chevron*

We apply the *Chevron* analysis where, as here, we are reviewing an interpretation of a statute by the agency that Congress has chosen to administer that statute. This is a two-step analysis, in which we first determine whether the statute is ambiguous in the sense that Congress has not clearly precluded the agency's interpretation, and then determine whether the agency's interpretation is reasonable. *See* 467 U.S. 837, 843-45 (1984). I agree with the majority that the Commission's interpretation in this case plainly surmounts the first step of *Chevron*. The statute does not unambiguously delineate what a political committee's "best efforts" entail. The statute's bare reference to "best efforts" does not preclude the Commission from expecting a little more from political committees than it has in the past.

I further agree that the Commission's new rule stumbles on *Chevron*'s second step. The Commission argues that its rule merely establishes one possible means by which a political committee may demonstrate "best efforts," but the language of the new rule is clear and to the contrary. According to the rule, "the treasurer and the committee will *only* be deemed to have exercised best efforts" if the committee follows the procedure prescribed by the Commission. 11 C.F.R. § 104.7(b) (emphasis added). It is not reasonable for the Commission to declare that only

strict adherence to its selected format will qualify as a political committee's best efforts. The phrase "best efforts" itself implies a range of actions should be acceptable. Nothing in the record suggests that the procedure endorsed by the Commission is the only manner in which a committee could make an effective request for information. In fact, testimony suggests that some political committees had adopted other reasonable approaches to obtain the information prior to the promulgation of the new rule. Based on this record, the Commission cannot decide that its chosen means by which a political committee obtains information categorically precludes compliance with the "best efforts" provision by any other efforts a political committee attempts.

The unreasonableness of the Commission's new rule may be easily illustrated. If a political committee sends seven follow-up letters, each proclaiming the prescribed statement in headline-size type, but notes in small print in each that the law requires disclosure only from political committees, not political contributors, then that committee has not demonstrated best efforts under 11 C.F.R. § 104.7(b)(2). If a committee sends seventy times seven follow-up letters, but in each asks after the health of the contributor's family, it also has not shown best efforts under the new rule. In either case, the fault is not in the committee—which has done all that the statute could have conceivably envisioned—but in the unreasonableness of the rule promulgated by the Commission.

2. *Arbitrary and Capricious*

That the rule permits only the one narrow means of demonstrating "best efforts" becomes more unreasonable upon examination of the procedure mandated by the Commission. The Commission demands that all response material of a political committee intone that "[f]ederal law requires political committees" to disclose information about "each individual" donor to the FEC. The pre-

scribed statement is clearly misleading in this context. Federal law does not require an individual to divulge his employer or his occupation, only that a political committee that receives such information must in turn disclose it to the FEC. Yet, a donor reading the required statement as it is currently worded is not likely to discern that distinction. *Cf. Bates v. State Bar of Arizona*, 433 U.S. 350, 383 & n.37 (1977) (noting that the legal sophistication of the audience is a key consideration in determining whether legal advertising is misleading). Even if the donor should notice that the statement by its terms only binds a political committee, the donor may still conclude that the statement intends to inform him that federal law compels a donor to divulge the information requested. Were it otherwise, a reasonable person would be right to wonder why this statement is even mentioned to the donor.

The required format of the follow-up request exacerbates the misleading nature of the prescribed warning. The Commission has very much limited the statements that may appear in the follow-up request because it fears that a political committee may hide its request for information amidst other visual clutter. Because of these limits on the request, however, a committee cannot include even a single clause to explain the warning in that follow-up. If a committee wishes to inform its contributors of the true extent of the law, it must send or otherwise convey an accompanying, but separate, explanation of the statement at its own additional expense in order to reassure the donor that it is not illegal to maintain his privacy.

The unreasonably misleading nature of the prescribed statement, coupled with the Commission's prohibition of additional explanation, provides sufficient grounds for us to hold the regulation arbitrary. Courts have suggested that an agency cannot mislead an individual. *See, e.g., Covington v. Dep't of Health & Human Serv.*, 750 F.2d 937, 942 (Fed. Cir. 1984) (holding a retirement to be

involuntary when the result of a misleading notice issued by an agency); *Shields Enterprises, Inc. v. United States*, 28 Fed. Cl. 615, 633 (1993) (indicating that if an agency's procurement procedure was misleading, it would be arbitrary). Likewise, the Commission cannot attempt to coerce through misleading statements of the law the individual disclosure that Congress chose not to require.

Not only is the prescribed statement misleading, but the Commission also did not sufficiently justify its choice of language for that statement in its decision. When an agency rejects other suitable alternatives without discussion, this court cannot reassure itself that the agency did not act arbitrarily by choosing an option that suffers a significant flaw. *See City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987). Here, the Commission did not solicit or encourage comment on the specific language to be used in such a prescribed warning. In discussing the language actually selected, the Commission only compared one statement, which told the donor that a committee was required to disclose donor information to the FEC, with a single other statement, which said that a committee was required by law to ask the donors for information. *See* 58 Fed. Reg. at 57,727. The Commission then briefly explained its preference for the former based on the single factor that the former may have contributed to higher levels of disclosure. The Commission apparently never considered many other obvious—and more accurate—explanations of the law. For example, the Commission offered no justification for not prescribing a more complete statement of the Act, which would note that a political committee must only use its best efforts to obtain certain information from persons who contribute more than $200 and that it must then disclose any such information obtained to the FEC. Failure of any agency to discuss obvious alternatives "has led uniformly to reversal." *City of Brookings Mun. Tel. Co.*, 822 F.2d at 1169 (citations omitted). I would thus find the statement of the law prescribed by the Commission

in 11 C.F.R. § 104.7(b) to be an abuse of its discretion. *See* 5 U.S.C. § 706(2)(A) (1994).

CONCLUSION

I agree that the Commission may change its interpretation of "best efforts." It may not, however, unreasonably limit the possible avenues for a political committee to show "best efforts" to a single format. I also agree that it may not prescribe a misleading statement of the law as part of a required format without permitting a political committee some opportunity to explain that statement. Because the Commission's interpretation is not a reasonable one, I would reverse the judgment of the District Court. I do not follow the majority's reasoning that the requirement for a stand-alone mailing separate from the requirements of the contents of that mailing can be severed and saved. I would simply remand for the invalidation of the entire regulation.

APPENDIX B

[Filed Jul. 22, 1994]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-1017 (JHG)

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,
Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiffs, Republican National Committee ("RNC"), National Republican Senatorial Committee ("NRSC") and National Republican Congressional Committee ("NRCC") (collectively "Committees"), initiated this action against defendant, Federal Election Commission ("FEC"), pursuant to the Administrative Procedure Act ("APA"), codified at 5 U.S.C. § 551 *et seq.*, the Federal Election Campaign Act ("FECA"), codified at 2 U.S.C. § 431 *et seq.*, and the First Amendment to the United States Constitution. Plaintiffs claim that a recently promulgated FEC regulation, which requires plaintiffs to enhance their efforts to obtain certain information from donors, is arbitrary and capricious or othewise contrary to law. Presently pending are the parties' cross-motions for summary judgment.[1] For the reasons expressed below, plaintiffs' motion is denied and defendant's motion is granted.

---

[1] Also pending is defendant's motion to strike the appendix to plaintiffs' motion on the basis that these documents are not in-

I. *Background*

Plaintiffs are the primary political committees of the Republican Party at the national level. The RNC is an unincorporated association comprised of 165 members that is responsible for day-to-day operation of the Republican Party. The NRSC is a political committee composed of members of the United States Senate organized to support Republican candidates in senatorial elections. The NRCC is the equivalent of the NRSC for the House of Representatives. Among other activities, plaintiffs solicit voluntary political contributions and provide financial support to Republican candidates.

The FEC is a federal agency with rulemaking authority. Its primary responsibility is to enforce the FECA, and it has authority to "make, amend, and repeal such rules . . . as are necessary to carry out the provisions of" the FECA. 2 U.S.C. § 437d(a)(8).

The FECA requires political committees, such as plaintiffs, to make periodic reports to the FEC. 2 U.S.C. § 434. These reports must include, *inter alia,* the name, address, occupation and employer of each donor whose aggregate annual contributions exceed $200.[2] 2 U.S.C. §§ 431(13), 434(b); 11 C.F.R. § 100.12. If a political committee fails to report this information, its treasurer is subject to fines or other penalties. 2 U.S.C. §§ 434, 437g; *see Buckley v. Valeo,* 424 U.S. 1 (1976).

Donors, however, are not required to provide their name, address, occupation and employer information to the political committee, and the FECA permits political

---

cluded in the administrative record. Because consideration of these documents does not alter the result reached here today, this motion will be denied.

[2] Political committees are prohibited from accepting cash donations exceeding $100. 2 U.S.C. § 441g. Because a check provides the donor's name and, usually, the donor's address, it is the occupation and employer information that is the focus of this controversy.

committees to retain contributions that are not accompanied by occupation and employer information. Consequently, the treasurers of the political committees are placed in a "no win" situation. They are subject to penalties if they do not report this information, yet they do not have to return contributions that lack the information and cannot compel the donors to produce it.

Congress attempted to rectify this problem when it amended the FECA in 1976. These amendments provided a "safe harbor" to committee treasurers—if "committee treasurers and candidates show that best efforts have been used to obtain and submit the information required [to be reported], they shall be deemed to be in compliance with" the reporting provisions of the FECA and not subject to penalties. 2 U.S.C. § 434(b) (1976).

The phrase "best efforts" was not defined in the 1976 amendments, and the FEC did not immediately promulgate regulations to clarify this ambiguous phrase. In 1979, Congress again amended the FECA. In the process, it recodified the "best efforts" requirement, but again failed to define "best efforts." [3]

The original regulations interpreting the phrase "best efforts" were promulgated in 1980. These regulations required the political committee to make one clear effort per solicitation to obtain any withheld personal information.[4] In 1992, however, the FEC issued a Notice of

---

[3] As amended in 1979, this section is presently contained in § 432(i), which provides, in pertinent part:

> When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by the [FECA] for the political committee, any report or any records of such committee shall be considered in compliance with [FECA].

2 U.S.C. § 432(i).

[4] This regulation required the political committee to make:

> at least one effort per solicitation either by a written request or by an oral request documented in writing to obtain such

Proposed Rulemaking to seek comments on proposed revisions to the "best efforts" regulations. 57 Fed. Reg. 44137 (1992); Administrative Record ("AR") at 3-8, 29-35, 41-42. On October 27, 1993, after an extended comment period, AR at 45-99, and a public hearing, AR at 114, 198-99, 212-476, the FEC announced that it would adopt revisions to the "best efforts" regulations. 58 Fed. Reg. 57725 (1993); AR at 1344. It did not, however, announce their effective date. *Id.*

The new "best efforts" regulations increase the burden on the political committee to attempt to obtain the name, address, occupation and employer information from donors.[5] The new regulations also require the political committees to include in their written requests the following statement: "Federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of $200 in a calendar years (sic)." *Id.* The regulations do not require, or even permit, the politi-

---

information from the contributor. . . . [S]uch effort shall consist of a clear request for the information (i.e., name, mailing address, occupation, and name of employer) which request informs the contributor that the reporting of such information is required by law.

11 C.F.R. § 104.7(b) (1992).

[5] These new regulations require, in pertinent part:

For each contribution received aggregating in excess of $200 per calendar year which lacks required contributor information . . . the treasurer must make at least one effort after the receipt of the contribution to obtain the missing information. Such effort shall consist of either a written request sent to the contributor or an oral request documented in writing. The written or oral request must be made no later than thirty (30) days after receipt of the contribution. The written or oral request shall not include material on any other subject or any additional solicitation, except that it may include language solely thanking the contributor for the contribution. . . .

11 C.F.R. § 104.7(b); *see* 58 Fed. Reg. 57729.

cal committees to notify donors that federal law does not require the donor to provide this information.

The FEC transmitted the revised "best efforts" regulations to Congress for the required thirty-day legislative review on Ocotber 22, 1993. *See* 2 U.S.C. § 438(d); 59 Fed. Reg. 10,057 (Mar. 3, 1994). Congress did not disapprove, and on March 3, 1994, the FEC published the effective date notice and made the regulations effective that same day. 59 Fed. Reg. 10057 (1994); AR at 1377-82. On April 26, 1994, plaintiffs asked the FEC to stay the effective date of the regulations pending judicial review and to permit a phase-in period if the new "best efforts" regulations were sustained. AR at 1378. The FEC denied this request on May 5, 1994, AR at 1384, and plaintiffs filed the instant action on May 9. Although plaintiffs originally sought a temporary restraining order and preliminary injunction, the parties agreed, in lieu thereof, to brief fully the issues involved on an expedited schedule and the matter is now ripe for final resolution.

II. *Discussion*

Summary judgment is appropriate when there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The inquiry performed is the threshold inquiry of determining whether there is a need for trial—whether, in other words, there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. At the same time, however, Rule 56 places a burden on the nonmoving party to "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,'

designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

A. *The Standard of Review*

Pursuant to the APA, a court may only set aside agency action if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Judicial review under this statute is "highly deferential," *American Horse Protection Ass'n v. Yeutter*, 917 F.2d 594, 596 (D.C. Cir. 1990), and a "court cannot substitute its judgment for that of an agency . . . and must affirm if a rational basis for the agency's decision exists." *Bolden v. Blue Cross & Blue Shield Ass'n, Inc.*, 848 F.2d 201, 205 (D.C. Cir. 1988). Nonetheless, the Court is the final authority on issues of statutory construction and must reject the agency's construction of a statute if it is inconsistent with the statutory mandate or if it would frustrate congressional intent.[6] *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981).

B. *The Agency's Construction of the Statute*

Plaintiffs' first argument is that the new rule is an impermissible construction of the "best efforts" provision. Plaintiffs' Motion at 19. To support this position, plaintiffs rely on four tools of statutory construction. First, plaintiffs argue that the House Report to the 1979 Amendments indicates that political committees would not be

---

[6] The Committees argue that the FEC is not entitled to any deference because this case touches upon core First Amendment activity, *see Riley v. National Fed'n of the Blind*, 487 U.S. 781, 788-90 (1988), and because the legislative history and other traditional tools of statutory construction weigh against the agency's interpretation. *See Northwest Airlines, Inc. v. United States Dep't of Transportation*, 15 F.3d 1112, 1118 (D.C. Cir. 1994). Plaintiffs/Petitioners Motion for Summary Judgment ("Plaintiffs' Motion") at 17-19.

required to repeatedly make the same request. Plaintiffs' Motion at 20.

This legislative history argument is unavailing. Because the "best efforts" provision was first enacted in 1976, and merely recodified in 1976,[7] the 1979 House Report constitutes the post-enactment opinion of a subsequent Congress, which is "of little assistance in discerning the meaning of the statute." *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439, 1452 (1944); *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1134 (D.C. Cir. 1987). Further, the 1979 House Report indicates that it is merely the opinion of the particular committee on how best to interpret the "best efforts" provision. H.R. Rep. 96-422, 96th Cong., 1st Sess. 14 (1979). Moreover, plaintiffs' argument that this provision is contrary to legislative intent is particularly unpersuasive in light of the fact that the new provision was submitted to Congress for a thirty-day legislative review prior to its enactment.[8] 2 U.S.C. § 438(d); *see FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. at 34; *Orloski v. FEC*, 795 F.2d 156, 166 (D.C. Cir. 1986). This legislative history simply does not "demonstrate a clear and certain congressional intent," *Rust v. Sullivan*, 500 U.S. 173, 189-90 (1991), sufficient to overcome the FEC's interpretation of the FECA.

Second, plaintiffs argue that the agency's interpretation of a statute when it was first adopted is evidence of that statute's proper interpretation. Plaintiffs' Motion at 21. This argument also must fail. Although a long-standing agency interpretation can enhance the level of deference

---

[7] The "best efforts" provision was not substantively changed by the 1979 amendments. *Compare* 2 U.S.C. § 434(b) (1976) *with* 2 U.S.C. § 432(i).

[8] This thirty-day legislative review period lasted over four months due to intervening congressional recesses. Defendant Federal Election Commission's Motion to Dismiss or, Alternatively for Summary Judgment at 19. Congress did not express disapproval.

given an agency, *Local No. 111 v. NLRB*, 946 F.2d 1264, 1270 (7th Cir. 1991), "an agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 863-64 (1984); *see Garcia v. United States*, 469 U.S. 70, 79 (1984).

Third, plaintiffs argue that a consistent administrative interpretation is important. Plaintiffs' Motion at 22. Here, the statute had the same meaning from 1980 until 1994. This factor, again, does not alter the result. An agency's change in interpretation is merely one factor to be considered in evaluating a regulation. *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 417 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984). The FEC modified this rule in light of its perception of non-compliance, AR at 1319, 1323, and an agency is not barred from changing a regulation based on subsequent experience. *See Consumers Union of U.S., Inc. v. FTC*, 801 F.2d 417, 426 (D.C. Cir. 1986).

Finally, plaintiffs argue that Congress does not intend to raise constitutional questions. *See Bell Atlantic Telephone Cos. v. FCC*, No. 92-1619 (D.C. Cir. June 10, 1994), Slip Op. at 6-7. Plaintiffs' Motion at 22. This regulation, plaintiffs assert, impinges upon plaintiffs' core First Amendment right to solicit contributions. Although this case does impact the First Amendment, the Supreme Court has already determined that FECA's reporting requirements are constitutional and that they serve compelling governmental interests. *Buckley*, 424 U.S. at 66. Plaintiffs cannot show that the new regulation is arbitrary and capricious or otherwise contrary to law. *See Rust*, 500 U.S. at 205 (noting that a regulation must raise "the sort of grave and doubtful constitutional questions . . . that would lead [a court] to assume Congress did not intend to authorize their issuance" to be invalid) (quotation omitted).

C. *FEC's Change of Position*

Plaintiffs' second agrument is that the regulations are arbitrary and capricious because the FEC has not explained why its earlier position was mistaken and that it has not explained how the new regulation is consistent with congressional intent. Plaintiffs' Motion at 24. The FEC, however, viewed the level of noncompliance and incomplete disclosure under the old regulation, AR at 1319, 1323, 1342-44, and weighed "the costs, burdensomeness and effectiveness" of the new regulation. AR at 1342. Based on this information, the FEC concluded that "Congress did not intend to preclude it from requiring that committees take additional measures when the information sought in the solicitation is not forthcoming." AR at 1323, 1344. This conclusion is not arbitrary and capricious. *See Consumers Union of U.S.*, 801 F.2d at 426.

D. *The First Amendment*

The third argument plaintiffs raise is that the mandatory solicitation statement required by the new rule is contrary to FECA and a violation of the First Amendment. It is plaintiffs' contention that the mandated statement requires political committees to provide donors with a "half-truth" because they must tell the donors that the committees are "require[d] to report" the occupation and employer information but cannot inform the donors that they have a legal right not to reveal this information to the political committee. Plaintiffs' Motion at 25. The Committees further argue that it is impermissible for the FEC to mandate the language they use in their solicitations and to limit the subjects of the solicitations. Plaintiffs' Motion at 27. These arguments must fail. The mandated statement provides an accurate statement of the law. Moreover, the "best efforts" regulation does not compel political committees to do anything, and there is no penalty for violation of the "best efforts" regulation. This provision merely provides a "safe harbor" for any com-

mittee that is unable to obtain all of the required information.[9] If a committee reports all of the required information or can prove that "best efforts" have been made in some other manner, the committee will not be subject to penalties.

Finally, plaintiffs argue that the revised "best efforts" regulations are not narrowly tailored to meet a compelling government interest. Plaintiffs' Motion at 29. It is, of course, settled that obtaining the information at issue is a compelling government interest. *See Buckley*, 424 U.S. at 66-68. This information provides an "essential means" to uncover violations of the FECA, is critical to informing the electorate who has donated money, and to which political committees, and deters corruption or even the appearance of corruption in the political system. *Id.*

The real question, therefore, is whether the regulation is narrowly tailored to achieve this end. Plaintiffs' challenges on this point are that the level of reporting under the old regulation was sufficiently high, and that the cost of the stand-alone request required by the new rule is unduly onerous.

With regard to the level of compliance, there is considerable disagreement on the level of compliance under the old "best efforts" regulation. Plaintiffs estimate that it reported approximately 90% [10] of the required information, while the FEC estimates that the Committees report less than 80%. Defendant Federal Election Commission's Opposition to Plaintiffs' Motion for Summary Judgment at 18-19 n.9. *See* AR at 276, 286, 1390. Even assuming plaintiffs' estimates are accurate, however, their argument

---

[9] The question of whether political committees can be required to report this information was settled in *Buckley*, 424 U.S. at 66-68, and plaintiffs do not challenge this here. Plaintiffs' Motion at 16.

[10] The FEC has moved to strike this evidence because it is outside the administrative record. Given the resolution today, however, it is unnecessary to strike this evidence.

is without merit. The FECA does not exempt political committees reporting 90% of the required information from the "best efforts" requirements. More importantly, plaintiffs have not introduced any evidence on the level of compliance of other political committees.[11] *See Athens Community Hosp., Inc. v. Shalala*, 21 F.3d 1176, 1180 (D.C. Cir. 1994) (noting that a rule is not arbitrary and capricious merely because it does not "provide the optimal result in some small number of cases") (quoting *State of Wisc. Dep't of Health and Social Servs. v. Bowen*, 797 F.2d 391, 399 (7th Cir. 1986)).

Similarly, the added costs imposed by the new regulation are insufficient to warrant the remedy plaintiffs' seek. Plaintiffs estimate that the increased costs caused by the new requirement that the request "not include material on any other subject or any additional solicitation," 11 C.F.R. § 104.7(b), will range from $1.50 to $6.00 per letter.[12] Plaintiffs' Motion at 12. Although this cost unquestionably impinges on plaintiffs' First Amendment rights, such a minimal burden is not unconstitutional in light of *Buckley*'s recognition of the strong governmental interest involved. 424 U.S. at 66-68. Moreover, the FEC had ample comments suggesting that the level of compliance could be enhanced if the committees were prevented from burying the mandatory statement on the back of another document or set it in small type as had apparently been done in the past. AR at 230-31 (noting that some committees included the request in smaller print or type on the back of the response card); AR at 386, 401, 419-20 (noting the advantages of a follow-up letter); AR at 1801 (noting high success rates with stand-alone follow-

---

[11] It should be noted that the FEC's survey of all political committees found that "party committees tended to have lower success rates than other committees in obtaining contribution information." AR at 1319.

[12] Other estimates of the added cost include "little or no added expense," AR at 429, to "at least fifty cents" per letter. AR at 225. Plaintiffs' estimate was the highest received by the FEC.

up requests). The FEC considered these comments and promulgated a new rule that is narrowly tailored to serve a compelling governmental interest.

III. *Conclusion*

For the reasons expressed above, it is hereby

ORDERED that plaintiffs' motion for summary judgment is denied; it is

FURTHER ORDERED that defendant's motion for summary judgment is granted; and it is

FURTHER ORDERED that defendant's motion to strike is denied. IT IS SO ORDERED.

July 22, 1994

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

[Filed Jul. 22, 1994]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-1017 (JHG)

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,
Defendant.

JUDGMENT

In accordance with the Memorandum Opinion and Order issued this date, judgment is hereby entered in favor of defendant Federal Election Commission and against plaintiffs, Republican National Committee, National Republican Senatorial Committee and National Republican Congressional Committee.

IT IS SO ORDERED.

July 22, 1994

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

APPENDIX C

[Filed Jun. 11, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5248

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Appellants

v.

FEDERAL ELECTION COMMISSION,
Appellee

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of appellants' Suggestion for Rehearing *In Banc*, the response thereto and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
Deputy Clerk

APPENDIX D

[Filed Jun. 11, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5248

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Appellants

v.

FEDERAL ELECTION COMMISSION,
Appellee

BEFORE: Edwards, Chief Judge, Sentelle and Tatel, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed April 5, 1996, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
Deputy Clerk

Circuit Judge Sentelle would grant the petition for rehearing.

APPENDIX E

[Filed Apr. 16, 1996]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5248

REBUBLICAN NATIONAL COMMITTEE;
NATIONAL REPUBLICAN SENATORIAL COMMITTEE;
NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE,
Appellants,

v.

FEDERAL ELECTION COMMISSION,
Appellee

ORDER

It is Ordered, *sua sponte,* that appellee respond to appellants' petition for rehearing and suggestion for rehearing *in banc* and do so on or before April 30, 1996.

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX F

[Filed Feb. 20, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5248

REPUBLICAN NATIONAL COMMITTEE,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE and
NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE,
Appellants

v.

FEDERAL ELECTION COMMISSION,
Appellee

ORDER

It is ORDERED, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Eva Brown
Deputy Clerk/CO

APPENDIX G

FEDERAL ELECTION COMMISSION

11 CFR Part 104

[Notice 1993-25]

Recordkeeping and Reporting by
Political Committees: Best Efforts

AGENCY: Federal Election Commission.
ACTION: Final rule; Transmittal of regulations to Congress.

SUMMARY: The Federal Election Commission is revising its regulations implementing the requirement of Federal Election Campaign Act ("FECA") that treasurers of political committees exercise best efforts to obtain, maintain and report the complete identification of each contributor whose contributions aggregate more than $200 per calendar year. The revisions are intended to ensure that solicitations clearly and conspicuously request the necessary contributor information, and to provide guidance when the information is not received with the contribution. The changes also state the Commission's rule that committees must report contributor identifications received either before or after the end of the applicable reporting period.

DATES: Further action, including the announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d). A document announcing the effective date will be published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, (202) 219-3690 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission is publishing today the text of revisions to its regulations at 11 CFR 104.7(b), which set forth steps needed to ensure that political committees obtain, maintain and report the names, addresses, occupations and employers of contributors whose donations exceed $200 per year. These regulations implement section 432(i) of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"). 2 U.S.C. 432(i).

On September 24, 1992 the Commission issued a Notice of Proposed Rulemaking (NPRM) in which it sought comments on proposed revisions to these regulations. 57 FR 44137 (Sept. 24, 1992). Twenty three written comments were received from fourteen commenters in response to the Notice. A public hearing was held on March 31, 1993, at which six witnesses presented testimony on the issues raised in the rulemaking.

The Commission also sent anonymous questionnaires to 200 randomly selected committees to obtain additional information from a larger number of committees regarding the specific methods currently used to obtain, maintain and report the necessary contributor information, and the cost and effectiveness of the methods used. Only committees that received 40 or more contributions of $200 or above during the '91-'92 election cycle were included. Approximately half of the authorized committees and party committees, and approximately one quarter of the nonconnected committees active during that election cycle had 40 or more contributions of over $200. Committees included in the survey ranged from those who received under $20,000 in contributions during 1992, to those whose contributions exceeded $5 million. The committees chosen were divided into three groups based on whether their reports contained a high, medium or low percentage of contributions containing information on contributors' name of employer. The questionnaire was sent to both incumbents' committees and challengers' committees. (Separate segregated funds were not included

in the pool of surveyed committees since most SSF contributors have an employment or other close relationship with the SSF's sponsoring organization.) Finally, the survey was publicized through an FEC Record article which invited other committees to participate in the survey.

The Commission received responses from 44 authorized committees, 11 party committees, 19 nonconnected committees and one unidentified committee. Six additional committees requested and completed questionnaires. Thus, there was a total of 81 responses. Although the questionnaires were completed anonymously, 74 included demographic information on the type of committee, its size, and whether it was in the upper third, middle, or lower third based on the amount of contributor information obtained. A compilation of these 74 responses to the survey questions is available from the Public Records Office.

Section 438(d) of title 2, United States Code requires that any rules or regulations prescribed by the Commission to carry out the provisions of title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on October 22, 1993.

Explanation and Justification

The FECA specifies that reports filed by political committees disclose "the identification of each * * * person (other than a political committee) who makes a contribution to the reporting committee * * * whose contribution or contributions [aggregate over $200 per calendar year] * * * together with the date and amount of any such contribuiton." 2 U.S.C. 434(b)(3)(A). For an individual, identification means his or her full name, mailing address, occupation and employer. 2 U.S.C. 431(13).

The Commission's regulations at 11 CFR 104.7(b) implement these statutory requirements. These rules are

being revised to address several concerns that have arisen, including the low percentage of complete reporting by some political committees. The regulatory changes focus on three areas in which problems have arisen: The phrasing and location of the request for the information in committee solicitations, the measures committees take if the necessary contributor information is not accompanying the contribution, and the reporting process. Please note that revised § 104.7(b) has been reorganized into four paragraphs to address the topics of solicitations, follow-up, reporting, and amendments separately.

In reviewing the operation of the current regulations, the Commission has given serious consideration to concerns raised by several commenters, witnesses, and survey respondents regarding the privacy interests of contributors, and the perceived intrusiveness of asking for information about contributors' home addresses, occupations and employers. Despite the concerns of some, 52 of the 74 survey responses compiled indicated that contributors seldom expressly informed committees that they do not wish to provide this information. Moreover, these concerns must be evaluated in light of the high priority the FECA places on the public interest in the disclosure of accurate and complete contributor information. Some witnesses and commenters believed that wide differences in reporting rates were attributable to variations in the seriousness of different committees' efforts to comply with the statutory requirements. They were concerned that the Commission's long-standing best efforts rules were inadequate in ensuring sufficient disclosure.

The Commission has also weighed concerns regarding the cost, burdensomeness, and effectiveness of various modifications to the regulations. In revising these rules, the Commission has made every effort to ensure that costs are reasonable, and has attempted to give committees as much flexibility as possible in utilizing the methods they have found to be cost efficient and effective. The

new rules establish procedures that many committees already follow voluntarily. As noted above, during the 1992 election cycle, about half of all authorized committees and party committees and three quarters of nonconnected committees had less than 40 individual contributions exceeding $200. Consequently, many committees will need to make minimal additional efforts, or none, to meet these requirements. In addition, these measures do not apply to contributors who give a political committee $200 or less per calendar year.

A. Solicitations

Under the previous regulations, to satisfy the best efforts requirement, the treasurer had to make at least one written or oral request per solicitation for contributor information. If the solicitation corresponding to a contribution requested the information and notified the solicitee that the committee is required by law to report such information, no further action had to be taken. Experience demonstrated, however, that the request for the information and the notice about reporting requirements often appeared in small type in a way that did not adequately convey their importance. For example, sometimes the request for occupation and employer was not included with the contributor's name and address on the front of the response card, but was placed on the back in lighter type or in a separate insert. Moreover, the regulations did not clarify what responsibilities a political committee has if the contribution does not correspond to a particular solicitation and it is not possible to know if the proper request and notice were provided. As a result, some committees have reported incomplete information for a significant percentage of their itemized contributions.

Accordingly, paragraph (b)(1) of § 104.7 is being revised to specify that if a political committee fails to provide all contributor information for any contribution, the best efforts defense is only available if the solicitation

included a clear request for the information. The comments, testimony, and survey results indicate that most political committees already do so, and that they have found this to be a successful, financially feasible method of obtaining contributor information. In order for the best efforts explanation to be available, solicitations for contributions of $200 or less must include the request, since contributors may make several contributions which are individually under $200, but which aggregate over $200 during the course of the calendar year. However, given that the best efforts requirements only apply when treasurers receive contributions aggregating over $200 per calendar year, contributions aggregating under this amount would not trigger the best efforts requirements. Further, any contribution which is reported by a committee with all required contributor information will meet the reporting requirements for such information, whether or not the committee asked for the information in the solicitation or used the language specified in 11 CFR 104.7(b)(1).

The revised rules at 11 CFR 104.7(b)(1) also prescribe the precise language to be included in the solicitation. The statement must say, "Federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of $200 in a calendar year." Statements such as "Federal law requires political committees to ask for this information," without more, do not meet the best efforts requirement. The results of the survey indicated that party committees tended to use the latter statement more frequently than authorized committees or nonconnected committees. Party committees tended to have lower success rates than other committees in obtaining contributor information.

Paragraph (b)(1) of § 104.7 also addresses the location, size and readability of the required language. This provision is intended to ensure that the request is more

likely to be seen and read by the contributor. Several commenters and witnesses at the hearing favored a requirement that would standardize the wording, type size, and placement of the request for contributor information.

B. Missing Information

Section 104.7(b)(2) is being revised to indicate that treasurers who receive itemizeable contributions lacking complete contributor identifications must take an additional step to obtain the information. The regulation gives committees flexibility to decide whether to send out written requests solely devoted to obtaining the needed information or to make telephone calls which are documented in writing. To ensure that a written request for the information is not overlooked, it cannot include material on other subjects or additional solicitations, but may thank the contributor for the previous contribution. The written or oral request must be made no later than thirty days after the receipt of the contribution. If a written request is sent out, it must be accompanied by a preaddressed return envelope or postcard. The results of the anonymous survey indicated that committees in the lower third in success rate were much less likely to include return envelopes.

Please note that these follow-up measures are required whenever complete contributor identifications are lacking, even if the solicitation associates with the itemizeable contribution asked for the information. The comments, testimony and survey responses to this approach reflected a wide diversity of views, including concerns regarding the cost and time needed to contact contributors to obtain missing information, and the perceived success or lack thereof for different follow-up measures. There was also a range of opinion regarding the importance of the public's right to know who is contributing tc candidates, and possible reasons some contributors are reluctant to provide the information. Consequently, the Commission be-

lieves that it is preferable to allow committees to have the choice of making either verbal or written follow-up requests, so that they may use whichever method they believe is most effective and least costly.

Some of the commenters and one witness construed the legislative history to mean that Congress wished to preclude what they presumed had been the Commission's previous practice of requiring multiple requests. The Commission notes that when the original "best efforts" provision was enacted by Congress in 1976, those offering the amendment stated that "[d]isclosure of a contributor's occupation and place of business, including the name of the firm where the person is employed, is vitally important if the public is to know and understand the source of a candidate's campaign funds." 122 Cong. Rec. 6963 (March 17, 1976) (statement of Sen. Clark).

In 1979, the statutory best efforts requirements were revised in several respects. The amount triggering reporting of occupation and employer was raised from $100 to $200. In addition, the candidate's obligation to exercise best efforts was eliminated, although the treasurer's obligation remained. The House Report states that:

> The application of the best efforts test is central to the enforcement of the recordkeeping and reporting provisions of the Act. It is the opinion of the Committee that the Commission has not adequately incorporated the best efforts test into its administration procedures, such as systematic review of reports.
>
> One illustration of the application of this test is the current requirement for a committee to report the occupation and principal place of business of individual contributors who give in excess of $100. If the committee does not report the occupation and principal place of business for each itemized individual contribution, the Commission's review and enforcement procedures must be geared to determining

whether the commitee exercised its best efforts to obtain the information. The best efforts test is crucial since contributor information is voluntarily supplied by persons who are not under the control of the committee.

In a situation such as this, the first question is what efforts did the commitee take to obtain the information. Did the solicitation contain a clear request for the occupation and principal place of business? If the committee made an effort to obtain the information in the initial solicitation and the contributor ignored the request, the Commission should not require the committee to make the same request two, three, or four times. On the other hand, if the best efforts test is not met, the committee must be required to take corrective action, such as contacting the contributor and reqesting the information.

H.R. Rep. No. 96-422, 96th Cong., 1st Sess. 14 (1979).

The Commission does not read this legislative history to preclude requiring multiple requests. In fact, the legislative history set out above indicates concern with the ineffectiveness of the Commission's previous approach. Similarly, in *Federal Election Commission v. Citizens for the Republic, et al.*, Civil Action No. 78-1116, (D.D.C. March 1, 1979) the Court emphasized the Commission's "duty * * * to give considerably more detailed guidance by regulations, instructions, or otherwise, as to what was to be done to get this information * * *." Transcript of hearing on defendant's summary judgment motion, p. 41. The Commission's initial best efforts regulations were promulgated in 1980 after this case was decided and after the 1979 Amendments to the FECA were enacted.

After careful consideration of the full legislative history, and in light of the subsequent level of incomplete disclosure since the 1980 best efforts rules were promulgated, the Commission concludes that Congress did not in-

tend to preclude it from requiring that committees take additional measures when the information sought in the solicitation is not forthcoming, such as a single request of a different type. Requiring committees to make a request which does not include any other subjects or solicitations, with an accompanying notice of the reporting requirement, will emphasize the importance and will be more in line with the true meaning of "best efforts." It will also clarify a committee's responsibilities regarding unsolicited contributions lacking the proper itemization information.

C. Reporting

The Commission is also adding new language at 11 CFR 104.7(b)(3) to ensure that contributor identifications are reported as accurately and as completely as possible. The revised rules in paragraph (b)(3) state the Commission's current policy that political committees are expected to review their own records, including contributor records, fundraising records and previously-filed FEC reports, so that they can report information known to them but not listed on contributor response cards. To prevent reporting of outdated information, political committees need only check their records and reports for the current two-year election cycle. In general, those who responded to the survey indicated that this approach enhances reporting either a great deal or somewhat with little increase in cost.

The Commission has decided not to add new language requiring a committee treasurer to report all contributor information which is not provided by the contributor, but which is in fact known by the committee treasurer or the treasurer's agents. Some commenters and survey participants expressed concern regarding the accuracy of the information they would be expected to provide when contributors are prominent individuals, and regarding outdated or incorrect information inadvertently supplied by the treasurer or committee staff. Revised § 104.7(b)(3)

does not include such a requirement because treasurers should not be encouraged to guess at contributor information.

Finally, new paragraph (b)(4) of § 104.7 sets forth the Commission's current policy that when political committees do not have complete contributor identifications at the time they file reports, they must include whatever information is available. In this situation, political committees have an obligation under the FECA to file amended reports if additional contributor information is obtained after the applicable reporting period. See Matters Under Review 3528, 3114 and 2674. Accordingly, new language is being added to § 104.7(b)(3) to explain more fully that political committees have two options for filing amendments. Under both options, it is important that committees clearly indicate the previous report, schedule, page number and line number which is being amended. Under the first option, on or before the next regularly scheduled reporting date, committees may amend each of their previous reports on which the contributions were originally reported. Under the second option, they may file a single memo Schedule A listing all the contributions for which they have received additional information, including the full name of each contributor, his or her mailing address, occupation, and employer, together with the amount and date of the contribution. Under this option, the information should be submitted at the same time committees file their next regularly scheduled reports. While both options are intended to promote more timely and complete reporting of contributor information, the second option avoids an increase in the number of times committees must file reports during the election year. Several commenters, survey participants and witnesses suggested timing the amendments to correspond to existing reporting dates. Although this means that months may elapse in non-election years before such information is placed on the public record, it will ensure more timely disclosure during election years.

Several comments and survey participants raised concerns regarding the burdensomeness of filing amendments over a lengthy period of time. Accordingly, the revised rules include language indicating that the requirement to file amendments regarding contributor information only applies to reports covering the two year election cycle in which contributions were received from a contributor, and does not require amendments to reports from previous election cycles. For example, if an itemizable contribution lacking occupation and name of employer is received in February, 1994, and a follow-up letter is sent in thirty days, and a response is received in April, 1994, amendments would be needed for previously filed reports covering the '93-'94 election cycle, but not for the '91-'92 election cycle. In situations where a contribution is received in late October, 1992, a follow-up request must be made by late November, 1992, and amendments to '91-'92 election cycle reports must be filed even if the information is not received until March, 1993.

D. Other Issues

Two commentaters suggested revising 11 CFR 9036.2 so that Presidential primary candidates would only receive matching funds for contributions containing complete contributor information. While full contributor identifications are required for threshold submissions, they are not currently required for additional submissions for matching funds. The commenters' suggestion is beyond the scope of this rulemaking, but may be addressed in a subsequent rulemaking.

The Commission also considered comments and testimony that itemizable contributions which do not contain complete contributor identifications be returned or held without depositing them, until the necessary information is requested and a response is forthcoming. These proposals would eliminate the need for amended reports, since they do not anticipate that anything would be reported until the contribution is deposited. Both of these approaches are

beyond the statutory authority granted to the Commission at this time. They were incorporated into the Commission's legislative recommendations submitted to Congress on January 26, 1993.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The attached final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that any small entities affected are already required to comply with the requirements of the Act in these areas.

List of Subjects in 11 CFR Part 104

Campaign funds, Political candidates, Political committees and parties, Reporting requirements.

For the reasons set out in the preamble, subchapter A, chapter I of title 11 of the Code of Federal Regulations is amended as follows:

PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)

1. The authority citation for part 104 continues to read as follows:

Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b).

2. Section 104.7 is amended by revising paragraph (b) to read as follows:

§ 104.7 Best efforts (2 U.S.C. 432(1)).

* * * *

(b) With regard to reporting the identification as defined at 11 CFR 100.12 of each person whose contribution(s) to the political committee and its affiliated committees aggregate in excess of $200 in a calendar year (pursuant to 11 CFR 104.3(a)(4)), the treasurer and

the committee will only be deemed to have exercised best efforts to obtain, maintain and report the required information if—

(1) All written solicitations for contributions include a clear request for the contributor's full name, mailing address, occupation and name of employer, and include the following statement: "Federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of $200 in a calendar years." The request and statement shall appear in a clear and conspicuous manner on any response material included in a solicitation. The request and statement are not clear and conspicuous if they are in small type of comparison to the solicitation and response materials, or if the printing is difficult to read or if the placement is easily overlooked.

(2) For each contribution received aggregating in excess of $200 per calendar year which lacks required contributor information, such as the contributor's full name, mailing address, occupation or name of employer, the treasurer makes at least one effort after the receipt of the contribution to obtain the missing information. Such effort shall consist of either a written request sent to the contributor or an oral request to the contributor documented in writing. The written or oral request must be made no later than thirty (30) days after receipt of the contribution. The written or oral request shall not include material on any other subject or any additional solicitation, except that it may include language solely thanking the contributor for the contribution. The request must clearly ask for the missing information, and must include the statement set forth in paragraph (b)(1) of this section. Written requests must include this statement in a clear and conspicuous manner. If the request is written, it shall be accompanied by a pre-addressed return post card or envelope for the response material;

(3) The treasurer reports all contributor information not provided by the contributor, but in the political committee's possession regarding contributor identifications, including information in contributor records, fundraising records and previously filed reports, in the same two-year election cycle in accordance with 11 CFR 104.3; and

(4)(i) If any of the contributor information is received after the contribution has been disclosed on a regularly scheduled report, the political committee shall either:

(A) File with its next regularly scheduled report, an amended memo Schedule A listing all contributions for which contributor identifications have been received during the reporting period covered by the next regularly scheduled report together with the dates and amounts of the contribution(s) and an indication of the previous report(s) to which the memo Schedule A relates; or

(B) File on or before its next regularly scheduled reporting date, amendments to the report(s) originally disclosing the contribution(s), which include the contributor identifications together with the dates and amounts of the contribution(s).

(ii) Amendments must be filed for all reports that cover the two-year election cycle in which the contribution was received and that disclose itemizable contributions from the same contributor. However, political committees are not required to file amendments to reports covering previous election cycles.

Dated: October 22, 1993.

SCOTT E. THOMAS,
Chairman, Federal Election Commission.

APPENDIX H

FEDERAL ELECTION COMMISSION

11 CFR Part 104

[Notice No. 1992-15]

Recordkeeping and Reporting by Political Committees: Best Efforts

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission is considering revising its regulations, which implement the requirement of the Federal Election Campaign Act ("FECA") that treasurers of political committees to exercise best efforts to obtain, maintain and report the complete identification of each contributor whose contributions aggregate more than $200 per calendar year. The proposed revisions would indicate that requests for the contributor information must state that federal law requires the committee to report the information. The proposed changes would also specify that committees must report contributor identifications received either before or after the end of the applicable reporting period. Further information is provided in the supplementary information which follows.

DATES: Comments must be received on or before December 18, 1992.

ADDRESSES: Comments must be made in writing and addressed to: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, N.W., Washington, DC 20463.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, (202) 219-3690 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Federal Election Campaign Act of 1971, as amended, specifies that reports filed by political committees disclose "the identification of each * * * person (other than a political committee) who makes a contribution to the reporting committee * * * whose contribution or contributions (aggregate over $200 per calendar year) * * * together with the date and amount of any such contribution." 2 U.S.C. 434(b)(3)(A). For an individual, identification means his or her full name, mailing address, occupation and employer. 2 U.S.C. 431(13) and 11 CFR 100.12. The FECA and the Commission's regulations require treasurers of political committees to exercise best efforts to obtain and report the identification of such contributors. 2 U.S.C. 432(i) and 11 CFR 104.7(b). To satisfy the best efforts requirement, the treasurer must make at least one written or oral request per solicitation.

Under the present regulations, if the solicitation corresponding to a contribution requests the information and notifies the solicitee that the committee is required by law to report such information, no further action need be taken. But experience shows that the request for the information and the notice about reporting requirements often appear in small type and in a way that does not adequately convey their importance. Moreover, current regulations do not clarify what responsibilities a committee has if the contribution does not correspond to a particular solicitation and it is impossible to know if the proper request and notice were provided. These weaknesses in the current "best efforts" regulations appear to have led to a significant percentage of incomplete itemizable contributions for some committees.

Accordingly, the Commission is seeking comment on a proposal requiring that a committee request the information and provide proper notice that reporting is required regarding any contribution received for which the information is lacking. This would ensure that a committee send out a written request with a proper notice, or make

a telephone contact documented in writing with such request and notice, even if the solicitation associated with the contribution asked for the information. Requiring a separate and distinct request, with an accompanying notice of the reporting requirement, will emphasize the importance of providing the information and will be more in line with the true meaning of "best efforts." It also will clarify a committee's responsibilities regarding unsolicited contributions lacking the proper itemization information.

The Commission is also considering adding new language to 11 CFR 104.7(b) to address the reporting of contributor identifications. The new language would clarify that when political committees do not have complete contributor identifications at the time they file reports, they must include whatever information is available. Political committees have an obligation to file amended reports if additional contributor information is obtained after the applicable reporting period. The FECA and the Commission's regulations require that committee treasurers use best efforts not only to obtain and maintain, but also to submit the information required. Accordingly, the proposed new language would indicate that an amended Schedule A should be filed listing the full name of each contributor, his or her mailing address, occupation, and employer, together with the amount and date of the contribution. These changes are intended to promote more timely and complete reporting of contributor information.

The Commission also is considering adding new language that would make it clear that a committee treasurer is required to report all contributor information which is not provided by the contributor but which is, in fact, known by the committee treasurer or the treasurer's agents. For example, if a contributor fails to disclose his or her employer and address to the committee but the treasurer knows the contributor's employer and address, the treasurer would be obligated to report the information in the committee's reports. The treasurer is responsible

for exercising "*best* efforts . . . to obtain, maintain and submit the information required by the Act." 2 U.S.C. 432(i) (emphasis added).

The Commission welcomes comments on the foregoing proposed amendment to 11 CFR 104.7 and the issues raised in this notice.

List of Subjects In 11 CFR Part 104

Campaign funds, Political candidates, Political committees and parties, Reporting requirements.

Certification of No Effect Pursuant To 5 U.S.C. 605(B) (Regulatory Flexibility Act)

These proposed rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that any small entities affected are already required to comply with the requirements of the Act in these areas.

For the reasons set out in the preamble, it is proposed to amend subchapter A, chapter I of title 11 of the Code of Federal Regulations as follows:

PART 104—REPORTS BY POLITICAL COMMITTEES

1. The authority citation for Part 104 would continue to read as follows:

Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b).

2. Section 104.7 would be amended by revising paragraph (b) to read as follows:

§ 104.7 Best efforts (2 U.S.C. 432(i)).

* * * *

(b) With regard to reporting the identificaiton as defined at 11 CFR 100.12 of each person whose contribution(s) to the committee and its affiliated committees

aggregate in excess of $200 in a calendar year (pursuant to 11 CFR 104.3(a)(4)), the treasurer will not be deemed to have exercised best efforts to obtain the required information unless each solicitation requests the information, and for each contribution received that lacks the required information, the treasurer has made at least one effort after the receipt of the contribution to obtain the missing information. Such effort shall be made by a written request sent to the contributor or by oral contract with the contributor documented in writing. The request must clearly ask for the missing information and inform the contributor that the committee is required by law to report the name, mailing address, occupation, and name of employer of each individual whose contributions aggregate over $200 in a calendar year. Notwithstanding the foregoing, a treasurer will not be deemed to have exercised best efforts unless he or she has reported all contributor information not provided by the contributor but, in fact, known by the treasurer or the treasurer's agents. All information in the committee's possession regarding contributor identifications must be reported in accordance with 11 CFR 104.3. If any of this information is received after the contribution has been disclosed on a regularly scheduled report, the identification shall be reported on an amended Schedule A together with the date and amount of the contribution.

Dated: September 18, 1992.

JOAN D. AIKENS,
Chairman, Federal Election Commission.

APPENDIX I

FEDERAL ELECTION COMMISSION

11 CFR Parts 100-115, 9008
[Notice 1980-8]

Amendments to Federal Election Campaign Act of 1971; Regulations Transmitted to Congress

AGENCY: Federal Election Commission.

ACTION: Transmittal of Regulations to Congress.

SUMMARY: FEC Regulations relating to the Federal Election Campaign Act, Pub. L. 96-187. January 8, 1960, 93 Stat. 1339-69, have been written and transmitted to Congress pursuant to Pub. L. 96-187, Title III, section 303. January 8, 1980, 93 Stat. 1368-89. The amendments were proposed by the Committee on House Administration of the House of Representatives (H.R. 5010) to simply the recordkeeping, reporting and disclosure requirements of the Act, to increase the role of State and local political parties in campaigns, to reduce the procedural requirements of the enforcement process and for other purposes. Further inforamtion on the intended effect of the proposed regulations is contained in the supplementary information below.

Pub. L. 96-197, title III, section 303 requires the Commission to transmit to the Congress prior to February 29, 1980 proposed rules and regulations prescribed by the Commission to implement the provisions and amendments made by Act. If neither House of Congress disapproves of the regulations within 15 legislative days after their receipt, the Commission may finally prescribe the regulations in question. The following regulations were transmitted to Congress on February 28, 1980.

DATE: Further action, including the announcement of an effective date and deletion of existing regulations in affected parts of 11 CFR will be taken by the Com-

mission after these regulations have been before Congress for 15 legislative days in accordance with Pub. L. 96-187, title III, section 303.

The Administrative Procedure Act, at 5 U.S.C. 353 (d)(3), provides that a substantive rule become effective not less than 30 days after publication, except as otherwise provided by the agency for good cause found and published with the rule.

It is possible that the 15 legislative day review period will expire in fewer than 30 calendar days from the date of publication of these regulations. Because the 1979 Amendments are already in effect and the 1980 election campaigns are already underway, it is essential that these regulations take effect as soon as possible to provide guidance to candidates and committees for compliance with the new requirements of the FECA. The Commission, in accordance with 2 U.S.C. 553(d)(3), finds good cause for waiving the 30 calendar day period of the APA and intends to finally prescribe these regulations as soon as possible following either Congressional approval or the expiration of the 15 legislative day review period.

FOR FURTHER INFORMATION, CONTACT: Ms. Patricia A. Fiori, Assistant General Counsel, 1325 K Street, NW, Washington, DC 20463 (202-523-4143).

Explanation and Justification of Regulations Concerning January 8, 1980 Amendments to Federal Election Campaign Act of 1971

* * * *

§ 104.7 Best efforts.

This subsection incorporates language found in House Report 96-422 at page 14, which gives examples of procedures that may be followed by a treasurer in satisfying the "best efforts" test set forth at 2 USC 432(i). In determining whether or not a committee has exercised "best efforts," the Commission's primary focus will be on the

system established by the committee for obtaining disclosure information. The main concern will be whether the committee has in place a systematized method of complying with the Act's disclosure requirements. Under proposed regulation 11 CFR 104.3(a)(4), the treasurer of a political committee must report the identification of each person whose contributions to such committee and its affiliates aggregate in excess of $200 per calendar year. The treasurer must make at least one effort, by clear written request or clear oral request contemporaneously documented in writing, to obtain identification information from the contributor. The request must also inform the contributor that the reporting of such information is required by law. The treasurer is provided with the opinion of making the request orally or in writing. Thus, he or she is given some latitude in deciding which type of request would be more effective in eliciting required information from the contributor. The requirement that the treasurer keep a written record of an oral request will assist in verifying that such a request was indeed made.

* * * *

104.7 Best efforts. (2 U.S.C. 432(1)).

(a) When the treasurer of a political committee shows that best efforts have been used to obtain, maintain and submit the information required by the Act for the political committee, any report of such committee shall be considered in compliance with the Act.

(b) With regard to reporting the identification as defined at 11 CFR 100.12 of each person whose contribution(s) to the committee and its affiliated committees aggregate in excess of $200 in a calendar year (pursuant to 11 CFR 104.3(a)(4)), the treasurer will not be deemed to have exercised best efforts to obtain the required information unless he or she has made at least one effort per solicitation either by a written request or by an oral request documented in writing to obtain such

information from the contributor. For purposes of 11 CFR 104.7(b), such effort shall consist of a clear request for the inforamtion (i.e., name, mailing address, occupation, and name of employer) which request informs the contributor that the reporting of such information is required by law.

APPENDIX J

FEDERAL ELECTION COMMISSION

11 CFR Parts 100-115, 140-146, 9008, 9031-9038

[Notice 1980-2]

Draft Regulations to Implement 1979 Amendments to FECA

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission publishes for comment draft regulations to implement the 1979 Amendments to the Federal Election Campaign Act (Pub. L. 96-187). The draft regulations have been prepared by Commission staff to facilitate public comment but have not been approved by the Commission. These proposed regulations would, among other things, reduce recordkeeping and reporting requirements, expand opportunities for volunteer activity by individuals and State and local party committees, reduce the number of entities required to register with the Commission, and amend the Commission's Advisory Opinion and Enforcement Procedures.

DATES: Comments must be received on or before February 7, 1980.

ADDRESSES: Address comments to Ms. Patricia Ann Fiori, Assistant General Counsel, Federal Election Commission, 1325 K Street NW, Washington, DC 20483.

FOR FURTHER INFORMATION CONTACT: Ms. Patricia Ann Fiori, Assistant General Counsel, (202) 523-4143.

SUPPLEMENTARY INFORMATION: Pub. L. 96-187, enacted on January 8, 1980, requires that all regulations to implement changes made by the 1979 Amendments be transmitted to Congress no later than February 29,

1980. In order to meet this deadline a final draft of the regulations incorporating public comments must be submitted for Commission consideration by mid-February. To allow Commission staff adequate time to review and incorporate public comments in to the final draft, the Commission finds it necessary to reduce the public comment period from the customary 30 day period to 15 days.

In order to focus public comments on the particular changes required by the 1979 Amendments, the Commission staff has prepared the draft regulations that are being published in this notice. These draft regulations are being published to facilitate public comment within the compressed time frame required by the Amendments. They have not been approved by the Commission and are not intended to serve as interim guidelines.

It should be emphasized that to achieve a smooth transition to operation under the new law, the Commission will concentrate on only those regulations necessary to implement changes made by Pub. L. 96-187. Public comments should therefore be confined to such changes.

Although the draft regulation being published today would only contain amendments to Parts 100-106 and Parts 108-113 of Title 11, Code of Federal Regulations, public comment is also invited to changes in other Commission regulations (11 CFR Parts 100-115, 140-146, 9008, 9031-9033) which may be necessitated by the amendments in Pub. L. 96-187.

Dated January 17, 1980.

Robert O. Tiernan.

Chairman, Federal Election Commission

* * * *

§ 104.7 Best Efforts.

(a) When the treasurer of a political committee shows that best efforts have been used to obtain, maintain and

submit the information required by this Act for the political committee, any report of such committee shall be considered in compliance with this Act.

(b) With regard to reporting the identification, as defined at 11 CFR 100.10, of each person whose contribution(s) to the committee and its affiliated committees aggregate in excess of $200 in a calendar year (pursuant to 11 CFR 104.3(a)(4)), the treasurer will not be deemed to have exercised best efforts to obtain the required information unless he or she had made at least one written effort subsequent to the initial solicitation to obtain such information from the contributor. For purposes of 11 CFR 104.7(b), such effort shall consist of a written request for any information (i.e., name, address, occupation, or name of employer) not previously supplied by the contributor.

§ 104.8 Uniform Reporting of Contributions.

(a) A reporting committee shall disclose the identification of each individual who contributes an amount in excess of $200. This identification shall include the individual's name, mailing address, occupation, the name of his or her employer, if any, and the date and amount of any such contribution. If an individual contributor's name or address is known to have changed since an earlier contribution reported during the calendar year, the exact name or address previously used shall be noted with the first subsequent entry.

(b) In each case where a contribution received from an individual in a reporting period is added to previously unitemized contributions from the same individual and the aggregate exceeds $200 in a calendar year, the reporting committee shall disclose the individual's name, mailing address, occupation, and the name of his or her employer on the prescribed reporting forms with the date and amount of any such contribution.

APPENDIX K

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5248

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

OPPOSITION TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

In accordance with the Court's order of April 16, 1996, the Federal Election Commission ("Commission") hereby opposes the appellants' ("Committees") petition for rehearing and suggestion for rehearing *in banc*. The Federal Election Campaign Act ("Act"), 2 U.S.C. §§ 431-55, requires political committes to disclose, *inter alia*, the name, address, occupation, and employer of each contributor whose aggregate annual contributions exceed $200. 2 U.S.C. §§ 431(13), 434(b)(3)(A). However, if such information is not reported, no violation will be found if the treasurer of a political committee can establish that "best efforts" were able to "obtain, maintain, and submit" the information. 2 U.S.C. § 432(i). This case concerns the Commission's regulation defining the minimal steps political committees must take in order to establish this "best efforts" defense. 11 C.F.R. § 104.7 (1995). The panel majority upheld the regulation's requirement that political committees send a stand-alone follow-up request to donors who fail to supply informa-

tion in response to the committees' original solicitation, although the panel struck down the requirement that the follow-up request include particular mandatory language (slip op. at 2).

Contrary to the Committees' argument and the requirements of Circuit Rule 35(c), this case is not of exceptional importance, and the panel's decision is not in conflict with decisions of this or any other court. The "best efforts" regulation responds to a large and serious failure of political committees to disclose donor identification information, but its solution is a simple, narrowly tailored measure that protects compelling governmental interests. As the majority noted (slip op. at 3):

> In *Buckley v. Valeo,* 424 U.S. 1, 60-84 (1976), the Supreme Court upheld the political committee reporting requirement against a First Amendment challenge. Applying "exacting scrutiny," *id.* at 64, the court sustained the requirement as "appear[ing] to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist," *id.* at 68.

The "best efforts" regulation is merely one modest aid in improving disclosure of this crucial information, and it is neither arbitrary and capricious, nor contrary to the First Amendment. Instead, it implements what is "essentially . . . an optional safe harbor or affirmative defense for political committees" (slip op. at 15). As the district court explained and the panel majority agreed (*id.*, quoting district court opinion), "the 'best efforts' regulation does not compel political committees to do anything, and there is no penalty for violation of the 'best efforts' regulation."

I. THE BEST EFFORTS REGULATION IS NOT ARBITRARY OR CAPRICIOUS

Under the Commission's regulation, if a political committee does not obtain and disclose the occupation and employer of all of its large contributors, it can show that

it made "best efforts" to obtain the information if it makes a follow-up request for the missing data with a "stand-alone" letter or phone call. This interpretation is consistent with the provision's legislative history, and it is entitled to deference (*see* slip op. at 5-8). "Inherently general open-ended, the [statutory] phrase 'best efforts' is well-suited for administrative refinement. Had Congress intended to limit the Commission to requiring a single request, it certainly could have made this clear" (slip op. at 6).

The Commission determined that "[t]o ensure that a written request for the information is not overlooked," a follow-up request cannot "include material on other subjects." 58 Fed. Reg. 57,725, 57-727 (1993). As the panel majority explained (slip op. at 16):

> The administrative record identifies as one cause of low donor response rates the burying of requests for donor information among other material. Because the regulation prohibits that practice, we are satisfied that it promotes the very gathering of information that *Buckley* found to be in the public interest.

On the other hand, the panel invalidated the mandatory language the regulation required to be included with committees' written solicitations and follow-up requests for information (*see* 11 C.F.R. § 104.7(b)(1), (2)), and thus the regulation as severed no longer contains specific requirements about what committees must say about the request for a contributor's occupation and employer.

Contrary to the Committees' straw man argument (Petition for Rehearing ("Pet.") 4, 7-8), however, after the Court's decision, political committees in their follow-up requests are not limited solely to asking for the missing information. While those requests cannot include "material on any other subject" (11 C.F.R. § 104.7(b)(2)), an explanation of the reason for the information request it-

self would be on the very same subject. Similarly, the Committees err by alleging (Pet. 7) that the panel majority "neglected to consider the rule it thus created" when it severed the mandatory statement from the rest of the regulation. In fact, the panel majority specifically stated (slip op. at 9), "We simply do not believe that Congress authorized the Commission to forbid political committees from accurately stating the law." The Court has thereby concluded that an accurate and complete explanation of the Act's reporting requirements should not make a stand-alone follow-up request unacceptable.[1]

The Committees also argue (Pet. 5-7) that the "best efforts" regulation unreasonably forecloses a range of methods to seek contributor information, but the Committees again overstate the regulation's restrictions. First, the regulation creates a floor, not a ceiling, on the efforts Committees must make to qualify for the "best efforts" defense. The Committees remain free to adopt any additional methods of obtaining contributor information that they choose. Second, because the regulation only becomes relevant when a committee *fails* to report contributor information, a committee that can obtain the information by alternative means will have no need to send out a follow-up request. Regardless of this flexibility, however, even if certain supporters might be alienated by a request to supply their occupation and employer, as the Commission assert (Pet. 5-6 n.6), the Supreme Court has already ruled that this possibility does

---

[1] Contrary to the Committees' argument (Pet. 5-6) and the panel dissent (dissent op. at 2), the regulation is not facially invalid simply because it is possible to imagine a hypothetical situation that would demonstrate great amounts of effort but still fail to satisfy the technical requirements of the regulation. "The fact that [the Committees] can point to a hypothetical case in which the rule might lead to an arbitrary result does not render the rule 'arbitrary or capricious.'" *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609 (1991). *See also Grayned v. City of Rockford*, 408 U.S. 104, 110 n.15 (1972).

not render the disclosure provision invalid. As the panel majority explained (slip op. at 15) (quoting *Buckley*, 424 U.S. at 67-68):

> The Supreme Court considered the important privacy and association rights at stake for donors, acknowledged that 'public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute,' and held that the disclosure requirements were 'the least restrictive means' of furthering the substantial government interests . . .

Finally, the Committees cite (Pet. 4) *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987), for the proposition that the Commission acted unreasonably by creating a "single method" of demonstrating best efforts. But the cited passage in *Brookings* deals with an agency's duty to consider responsible alternatives to its chosen policy, not a duty to choose a policy that itself includes alternatives. The Committees do not dispute that the Commission considered their favored alternative—requiring only a single committee request for contributor information in a contribution solicitation—so the cited holding in *Brookings* is irrelevant.[2] In sum, "the Commission's new regulation results from exactly the kind of agency balancing of various policy considerations to which courts should generally defer" (slip op. at 13).

---

[2] In dissent (slip op. at 4), Judge Sentelle cited *Brookings* only in discussing why he thought the Commission had improperly failed to consider suitable alternatives to the regulation's mandatory statement, which the panel struck down. The Commission has not yet decided whether to petition for *certiorari* on this issue. However, the Commission has not sought rehearing on this issue, and it is irrelevant to the Committees' petition.

II. SEVERANCE OF THE REGULATION WAS PROPER

After the Court struck down the "best efforts" regulation's mandatory statement, it was entirely appropriate to uphold the regulation's requirement of a stand-alone follow-up request. "[T]he presumption is always in favor of severability." *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1394 (D.C. Cir. 1990); *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) ("presumption is in favor of severability") (quoting *Buckley*, 424 U.S. at 108). When the "severance and invalidation of [a portion of a regulation] will not impair the function of the statute as a whole, and there is no indication that the regulation would not have been passed but for its inclusion," the offending portion of a regulation "must be" severed from the remaining regulation. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988).

The Committees flip this presumption on its head, and the cases they cite do not support their position.[3] *FPC v. Idaho Power Co.*, 344 U.S. 17, 20-21 (1952), dealt not with a regulation, but with an administrative order authorizing a hydro-electric project on certain conditions. In its discussion of the appellate court's decision that the license should be issued without the conditions, the Supreme Court merely held that the Federal Power Commission, not the reviewing court, should decide whether the license should have been issued once the conditions had been eliminated. Similarly, *Catholic Social Service v. Shalala*, 12 F.3d 1123, 1128 (D.C. Cir. 1994) does *not* hold, as the Committees assert (Pet. 9), that the "remainder of [a] regulation must also fail unless there is a clear indication that the agency would have adopted the remaining portion independently." Instead, the Court

[3] The Committees assert (Pet. 9) that "where a portion of a regulation is struck down, the remainder of that regulation must also fall unless there is a clear indication that the agency would have adopted the remaining portion independently."

held, 12 F.3d at 1128, that "[i]t would . . . exceed the statutory scope of review for a court to set aside an entire rule where only a part is invalid, and where the remaining portion may sensibly be given independent life." Thus, only if "there is substantial doubt that the agency would have adopted the same disposition regarding the unchallenged portion" is partial affirmance improper. *North Carolina v. FERC*, 730 F.2d 790, 796 (D.C. Cir. 1984). The Committees fail to demonstrate that any such doubt exists here.[4]

As the panel majority discerned (slip op. at 16-17), the record demonstrates that the Commission would have adopted the remaining regulation even without the mandatory statement. The Commission's initial proposed regulation did not even include the mandatory statement, but instead spoke generally about political committees sending out "a written request with a *proper notice*." 57 Fed. Reg. 44,137 (1992) (emphasis added). Now that the panel has invalidated the mandatory statement, the regulation can "sensibly be given independent life," *Catholic Social Service*, 12 F.3d at 1128, in a manner almost identical to the approach taken in the Commission's notice of proposed rulemaking.[5]

---

[4] In addition, the Act contains a severability clause that requires that the invalidation of an "application" of the Act shall not affect the validity of other applications. 2 U.S.C. § 454. The Supreme Court has characterized the language of this clause (when it appeared in the Social Security Act) as a "strong severability clause." *Califano v. Westcott*, 443 U.S. 76, 90 (1979).

[5] The Committees' assertion (Pet. 9) that the Commission considered the mandatory statement a "necessary" requirement of the new regulation is a blatant distortion. The Commission argued in its appellate brief (Br. 40) that the prescribed statement served First Amendment interests by eliminating any ambiguity about what constitutes an acceptable notice to contributors, but that argument is in no sense tantamount to asserting that the Commission viewed such verbatim guidance as "necessary" for the stand-alone follow-up request to function sensibly.

Furthermore, as the panel majority explained (slip op. at 11-13) and as the administrative record demonstrates (*see generally* Joint Appendix 99-113, 338-590, 629-44), the overwhelming focus of the hearing testimony, written comments, and survey responses was on which follow-up efforts could best improve disclosure rates. The Commission is not aware of anything in the administrative record suggesting that additional follow-up efforts would be unworkable or unreasonable without specifying the exact language to be used in the notice to contributors, and the Committees cite nothing in the record to support such a proposition.

Even though the regulation as severed contains no specific language to be included in the follow-up requests, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) (citing *Grayned*, 408 U.S. at 110). If the Committees or other persons need additional guidance, they can avail themselves of the Act's advisory opinion process. Under 2 U.S.C. § 437f(a)(1), any "person" may request an advisory opinion from the Commission, which enables a committee to "remove any doubt there may be as to the meaning of the law." *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973). *Accord Martin Tractor Co. v. FEC*, 627 F.2d 375, 386 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980).[6]

Finally, it is difficult to understand why the Committees believe (Pet. 8) the follow-up request would be so "literally inexplicable" to their contributors that it raises "troubling constitutional implications," and yet the Committees apparently have no such concern about—and thus

---

[6] Of course, the Commission would also have the option, once the decision in this case is final, of considering additional regulatory language consistent with the outcome of this case, to give greater guidance in framing an acceptable request for information.

choose not to challenge (Pet. 3 n.3)—the requirement to make a similar request (without the mandatory statement) as part of all written contribution solicitations. The Committees fail to explain why the same request for information is understandable as part of a contribution solicitation, but unclear and unworkable as part of a follow-up request. The Committees thus undermine their own arguments on severability and make clear that their true objection is merely to the bother and expense of having to send out follow-up requests, as they originally argued to the panel, and not to the nature of the message to be included in those requests.

III. THE BEST EFFORTS REGULATION DOES NOT VIOLATE THE FIRST AMENDMENT

As the panel majority explained (slip op. at 3, 15), the Supreme Court has already held that the Act's disclosure requirements do not violate the First Amendment because they are the "least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Buckley*, 424 U.S. at 68. The Court ruled that disclosure of each large contributor's "name and address, as well as his occupation and principal place of business," 424 U.S. at 82, "serves informational functions, as well as the prevention of corruption and the enforcement of the contribution limitations," *id.* at 83. The statute, when it was upheld by the Court, contained no exception for a committee that was unable to obtain the required information. As the panel concluded (slip op. at 15), since the "best efforts" provision, as applied by the Commission, makes the reporting requirement *less* demanding than the absolute requirement upheld in *Buckley*, this less onerous reporting requirement cannot be unconstitutional.

The Committees contend (Pet. 11) that "*Buckley* did not sustain any such required disclosure," but that the Court "ruled only on the basis of arguments 'to the ex-

tent [urged] by the parties.'" This contention is flatly contradicted both in the *Buckley* footnote cited by the Committees (424 U.S. at 143 n.178), and in the Court's discussion of the Act's disclosure requirements. First, the Court stated in footnote 178 that it was resolving issues "to the extent urged by the parties" only with respect to certified constitutional question 9. Question 9 involved only allegations of vagueness in certain other provisions (*see id.*, citing the appellate decision under review at 519 F.2d 821, 901 (D.C. Cir. 1975)); it was question 7(b) that involved the constitutionality of the disclosure requirements at issue here (424 U.S. at 85 n.113). The language quoted by the Committees is thus irrelevant in this case. Second, and more important, as the panel majority noted (slip op. at 15), the *Buckley* opinion (424 U.S. at 82-83) specifically discussed and upheld the Act's requirement that political committees report large contributors' occupations and employers. Moreover, the Court, a few pages later (*id.* at 85 n.113), could not have been more specific when it ruled:

> [Question 7(b):] Does 2 U.S.C. §§ 434(b)(1)-(8) (1970 ed., Supp. IV) violate such rights [under the First, Fourth, or Ninth Amendment, or the Due Process Clause of the Fifth Amendment], in that it requires political committees to register and disclose the names, occupations, and principal places of business (if any) of those of their contributors who contribute in excess of $100?
>
> Answer: No.

The Committees next argue (Pet. 12) that they are impermissibly silenced because the follow-up request cannot contain extraneous messages. As the panel majority explained (slip op. at 16), however, the regulation "forbids additional speech not because of any hostility to the content of that speech, but to 'ensure that a written request for the information is not overlooked'" (quoting 58 Fed. Reg. at 57,727). The regulation is content neu-

tral because it prohibits *all* extraneous material—not just political speech—that would clutter and obscure the information request. But since the Committees remain entirely free to express their views to their contributors on any subject in all other communications, this amounts to nothing more than a reasonable restriction on the time, place, or manner of such speech. *See Rock Against Racism*, 491 U.S. at 791. The Commission's purpose—the "controlling consideration" (*id.*)—is to make sure that the information request is not overlooked, not to suppress the political messages of committees. The "stand alone" aspect of the regulation thus easily meets the "narrowly tailored" standard applicable to such regulations. *See id.* at 798-99. *See also Buckley*, 424 U.S. at 28 (contribution limits "leav[e] persons free to engage in independent political expression").

Finally, the Committees suggest (Pet. 13) that their inability to "explain the follow-up request at the time it is made" by itself renders the regulation unconstitutional. This argument is based on the Committees' mistaken premise, discussed *supra* pp. 4-5, that the regulation as severed prohibits an accurate explanation of the Act's operative disclosure requirement in the follow-up request. It also ignores the simple option of including explanatory material with their original solicitations. Section 104.7(b)(1) addresses written solicitations for contributions and states that to show "best efforts" there must be a "clear and conspicuous" request for contributor information as part of such solicitations, but this section does not attempt to limit speech in any way. Thus, for example, the Committees are free to explain in their written solicitations that unless the contributor provides the requested information, the Committees will need to expend part of the contribution to make a written or oral stand-alone request for missing contributor information (for contributors over the $200 threshold). Such an explanation would not only be permissible under § 104.7(b)(1), but would also represent an "alternative channel that effec-

tively allows committees to explain the additional request for information" (Pet. 13). It might also persuade many contributors concerned about the Committees' use of resources to provide the requested information initially, so that fewer follow-up requests would be necessary.

In sum, the regulation's restriction on extraneous messages in follow-up requests is content neutral and narrowly tailored, and it leaves ample opportunity for the Committees to speak on any subject in all of their other communications.

CONCLUSION

For the foregoing reasons, the Court should deny the Committees' petition for rehearing and suggestion for rehearing *in banc*.

Respectfully submitted,

/s/ Lawrence M. Noble (RBS)
LAWRENCE M. NOBLE
General Counsel

/s/ Richard B. Bader
RICHARD B. BADER
Associate General Counsel

/s/ David Kolker
DAVID KOLKER
Attorney

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 219-3690

April 30, 1996

APPENDIX L

[Filed Apr. 5, 1996]

FOR THE DISTRICT OF COLUMBIA CIRCUIT
UNITED STATES COURT OF APPEALS

No. 94-5248

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and this Court's local rules, the Republican National Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee (collectively "the Committees") respectfully petition for rehearing and suggest rehearing *in banc* of the decision issued by a panel of this Court on February 20, 1996.

CONCISE STATEMENT OF ISSUE AND ITS IMPORTANCE

At issue in this case is the right of political committees to communicate with their contributors in a manner intended both to maximize political expression and to comply with federal disclosure laws. The Federal Election Commission ("FEC") has enacted a regulation that seeks to increase disclosure of personal information by individ-

uals who contribute $200 or more to a political committee. However, in doing so, the FEC has determined that *only* a particular form of request by a committee to its contributors, exclusive of any explanatory information or other speech on the committee's part, is permissible to satisfy its requirements. This regulation is thus directly contrary to 1) the FEC's governing statute, which only requires that committees exercise their "best efforts" to obtain missing donor information, and 2) to the First Amendment, which guarantees political committees' rights to free speech. Therefore, the divided panel's opinion rejecting the Committee's Administrative Procedures Act and constitutional challenges to the FEC's procrustean insistence on an exclusive method of follow-up inquiry should be reconsidered, either directly or by this Court *in banc*.[1]

BACKGROUND

The challenged regulation, 11 C.F.R. §104.7 (henceforth, the "best efforts regulation"), interprets § 432(i) of the Federal Election Campaign Act ("FECA"). That section provides:

> When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any such records of such committee shall be considered in compliance with this Act. . . .

2 U.S.C. § 432(i).[2] The referenced information is the name, address, occupation, and employer of each person who contributes over $200 to a committee during a cal-

---

[1] The majority opinion in this case was written by Judge Tatel and joined by Chief Judge Edwards. Judge Sentelle filed an opinion concurring in part and dissenting in part. The opinion is attached hereto as Addendum I.

[2] A copy of the regulation is attached hereto as Addendum II.

endar year. Contributors have *no* legal obligation to supply any of this information.

The best efforts regulation interprets this provision to require, *inter alia*, a committee receiving a contribution aggregating in excess of $200 from a single contributor to make one attempt per such contribution to obtain any missing information.[3] This follow-up request must be either a written request sent to the contributor or an oral request documented in writing. The request cannot include material on any other subject or any adidtional solicitation, except that it may include language specifically limited to thanking the contributor for the contribution. Additionally, all written requests must be accompanied by a pre-addressed return post card or envelope for the response material. Finally, all requests must be made no later than thirty days after receipt of the contribution.

The regulation also requires that, for all written follow-up requests, the following statement be included:

> Federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of $200 in a calendar years [sic].

See 11 C.F.R. § 104.7(b)(2).

The appellate panel reviewing the Committees' challenge to this regulation unanimously struck down the required statement in follow-up requests as unreasonable and contrary to FECA. *RNC et al v. FEC*, Slip Opinion at 16.[4] However, a majority of the panel upheld the sep-

---

[3] The regulation also requires committees to request the desired information in all initial solicitations. 11 C.F.R. 104.7(b)(1). The Committees do not challenge this provision and, indeed, ask for the required information in all solicitations they make.

[4] Citation to the majority panel's decision will henceforth be styled "Sl. Op. at ——." Citation to the dissent will be styled "D. Op. at ——."

arate follow-up requirement, including its ban on additional speech. In doing so, the majority of the panel opined that the follow-up requirement was severable from the struck portion of the regulation.[5]

Judge Sentelle's dissenting opinion stated that the regulation's creation of a single method of demonstrating best efforts "unreasonably limit[s] the possible avenues for a political committee to show 'best efforts' to a single format." D. Op. at 4. Accordingly, the regulation should fail as arbitrary and capricious. *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987) (agency action is arbitrary and capricious where agency rejects suitable alternatives without discussion in favor of a significantly flawed option). The dissent further indicated that there was nothing in the regulation to suggest that the required follow-up request was severable, and therefore the entire regulation should properly have been struck down. *Id.* at 5.

Thus, as the regulation now stands, the *only* way in which a committee can show that it has made its "best efforts" to comply with § 432(i) is to make a follow-up request at its own expense, which cannot include either an explanation or a solicitation for funds to cover the costs of the follow-up. In fact, *all* additional speech by the committee is banned by the regulation, other than a "thank-you." 11 C.F.R. § 104.7(b)(2) (the "request shall not include material on any other subject or any additional solicitation. . . ."). Accordingly, the regulation is both arbitrary and capricious and contrary to the First Amendment.

---

[5] The Committees do not challenge the panel's conclusion as to the required statement. However, the Committees do challenge the majority's conclusion that this portion of the regulation is severable from the remainder of the rule. *See* Section II below.

ARGUMENT

I. THE BEST EFFORTS REGULATION IS ARBITRARY AND CAPRICIOUS.

The essential problem with the best efforts regulation is that it turns a flexible statutory concept into a rigid regulatory procedure that establishes a single approach to obtaining desired, but not mandated, disclosure. In effect, committees are not free to establish their own "best efforts"; they are required to use the FEC's standardized "best efforts." This represents a failure of the FEC's rule to "harmonize[] with the plain language of the statute, its origin, and its purpose," and thus it cannot stand. *Nat'l Muffler Dealers Assn. v. United States*, 440 U.S. 472, 477 (1979) (defining standard for assessing whether a regulation carries out the congressional mandate in a proper manner).

As the dissent correctly stated, the statutory term "best efforts" implies a "range of actions should be acceptable" for a committee to attempt to obtain information from its contributors who have previously chosen not to supply information that they have no obligation to supply. D. Op. at 1. As the evidence that the FEC received during the rulemaking shows, committees of different sizes and ideologies use a variety of methods to obtain contributor information, and have varying results when using the same methods.[6] It is unreasonable to suggest, let alone require, that all committees use the same method to seek contributor information. As Judge Sentelle noted:

> The unreasonableness of the [best efforts regulation] may be easily illustrated. If a political committee sends seven follow-up letters, each proclaiming

---

[6] The reference to ideology reflects that some committees' entire support base may be comprised of individuals who find the request for information itself to be overly intrusive, further complicating these committees' efforts to maximize disclosure. The FEC received evidence to this effect from the Libertarian Party. *See* Joint Appendix at 164, 495-535.

> the prescribed statement in headline-sized type, but notes in small print in each that the law requires disclosure only from political committees, not political contributors, then that committee has not demonstrated best efforts. . . . If a committee sends seventy times seven follow-up letters, but in each asks after the health of the contributor's family, it also has not shown best efforts. . . . In either case, the fault is not in the committee—which has done all the statute could have conceivably envisioned—but in the unreasonableness of the [best efforts regulation].

D. Op. at 2. Clearly there are situations where it makes sense, either because of the number of contributors involved or the philosophic bent of those contributors, for a committee to adopt its own method for obtaining conribution information. To foreclose all those methods, however effective they might be, is plainly unreasonable.

Moreover, Judge Sentelle's straight-forward interpretation of the statutory term "best efforts" is supported by the legislative history. The House Report regarding the "best efforts" language provides as follows:

> One illustration of the application of this test is the current requirement for a committee to report the occupation and principal place of business of individual contributors who give in excess of $100.[7] If the committee does not report the occupation and principal place of business for each itemized individual contribution, the Commission's review and enforcement procedures must be geared to determining whether the committee has exercised its best efforts to obtain the information. The best efforts test is crucial since contributor information is voluntarily supplied by persons who are not under the control of the committee.

---

[7] This threshold later was changed to $200. 2 U.S.C. § 434(b)(3).

> In a situation such as this, the first question is what efforts did the committee take to obtain the information. Did the solicitation contain a clear request for the occupation and principal place of business? If the committee made an effort to obtain the information in the initial solicitation and the contributor ignored the request, the Commission should not require the committee to make the same request two, three, or four times. On the other hand, if the best efforts test is not met, the committee must be required to take corrective action, such as contacting the contributor and requesting the information.

H.R. Rep. No. 422, 96th Cong., 1st Sess. 14 (1979).[8] This language confirms that Congress was not imposing a single specific requirement on committees; rather, it envisioned good faith attempts at furnishing contributor information. The FEC has thus unilaterally decided, without any statutory support, that it can create a new requirement for committees subject to its jurisdiction. Such an interpretation is beyond the meaning of the statute, and cannot be countenanced. *See Nat'l Bank of Oregon v. Independent Ins. Agents*, 113 S. Ct. 2173, 2182 (1993) (statute's plain meaning must be enforced).

Furthermore, the majority panel, by focusing on the required statement it struck down, neglected to consider the rule it thus created. Committees can only ask for the missing information—the rule prohibits additional speech, including an explanation of the request. 11 C.F.R. § 104.7(b)(2). Committees are now required to engage in a follow-up request that is literally inexplicable to the

---

[8] The majority panel dismissed this report as post enactment legislative history because the term "best efforts," was used in an earlier section of FECA, § 434(b). However, that section imposed different requirements regarding disclosure and was repealed in 1979. Thus, the 1979 legislative history is the only history related to the "best efforts" requirement now in effect under § 432(i). *See* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1976 & Supp. 1979).

very contributors whose support is vital to the committees' function. Without further consideration by this Court, committees will be seriously undermined in their efforts to raise political funds, as they may needlessly jeopardize their relations with their supporters through confusing and invasive communications seeking personal information which the contributors may view as a waste of their previously-contributed funds. The FEC regulation does not allow committees to tailor their efforts to their audience to get the required information, and even precludes committees from quoting the statutory language the FEC claims authorizes its regulation. This ban on speech—aside from its troubling constitutional implications, discussed further below—simply does not accord with the language of the statute or its apparent intent.

Thus, the FEC regulation is arbitrary and capricious for two reasons shown above: (1) the regulation mandates a single method of compliance with the "best efforts" standard; and (2) the regulation precluded further speech by the committees in its follow-up requests. The regulation is therefore contrary to the APA and cannot stand. *See Chamber of Commerce v. FEC*, 69 F.3d 600, 606 (D.C. Cir. 1995). This case should be reconsidered or heard *in banc*, so that political committees are not put through regulatory exercises that both needlessly deplete their resources and may affirmatively damage their relations with their supporters.[9]

II. THE APPELLATE PANEL IMPROPERLY SEVERED THE REGULATION.

Established law provides that, where a portion of a regulation is struck down, the remainder of that regula-

---

[9] This depletion of resources is not the mere cost of postage—the Committees presented evidence that, once personnel and other such costs are included, it will cost approximately $6 per letter, resulting in an annual expense between $300,000 and $1,200,000. That is a considerable outlay of contributors' funds originally tended to promote political speech.

tion must also fall unless there is a clear indication that the agency would have adopted the remaining portion independently. *See FPC v. Idaho Power Co.*, 344 U.S. 17, 20-21 (1952); *Catholic Social Service v. Shalala*, 12 F.3d 1123, 1128 (D.C. Cir. 1994). Here, however, the majority panel has allowed portions of the best efforts regulation to remain in force, despite lingering constitutional issues and questions as to whether the remaining regulation can be intelligibly applied.

The majority panel, while striking down the required statement, specifically held that the required follow-up provision of the best efforts regulation was severable, over the dissent's objection. Sl. Op. at 16. In doing so, it relied on the fact that the FEC's initial notice of proposed rulemaking did *not* include the required statement, and thus the majority had no doubt the remaining rule was intended to be severable. This does not accord with the FEC's own view, which is that the statement served constitutional concerns by clarifying "an ambiguous statutory term and giving committees specific guidance." FEC Brief at 40, citing *Riley v. National Federation for the Blind*, 487 U.S. 781, 793-894 (1988) (criticizing a state law's failure to define statutory terms clearly). Thus, the FEC did consider this requirement necessary to its new regulatory scheme.

More important than the FEC's perceived intent with respect to the regulation is the effect of severing the regulation on committees trying to comply with its terms. The regulation provides that:

> the [follow-up] request shall not include material on any other subject or any additional solicitation, except that it may include language solely thanking the contributor for the contribution. . . . The request must clearly ask for the missing information, and must include [the required statement].

11 C.F.R. § 104.7(b)(2). It is thus unclear what exactly is mandated by the regulation and to what degree

(if any) a committee can explain the purpose of the request, rather than simply asking for the information. This degree of imprecision with respect to mandated speech raises serious constitutional concerns. *See NAACP v. Button*, 371 U.S. 415, 438 (1962) ("[p]recision of regulation must be the touchstone" in assessing compatibility with First Amendment rights).

Moreover, this imprecision raises the question whether this remaining portion of the statute "may sensibly be given independent life" and thus be upheld. *Catholic Social Service*, 12 F.3d at 1128. Without such a clear understanding, the regulation may not be severed and cannot be sustained, as the required statement itself is a misleading statement of the law, and thus arbitrary and capricious. *See* D. Op. at 3; citing *Covington v. Dept. of Health and Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984). Accordingly, the majority panel erred in upholding portions of the flawed regulation, and this Court must remedy that error.

III. THE BEST EFFORTS REGULATION IS CONTRARY TO THE FIRST AMENDMENT.

The Committees challenged the best efforts regulation as contrary to the First Amendment for two reasons. First, the regulation compelled misleading speech in the form of the required statement. Second, the regulation prohibited other speech in the follow-up requests. The panel determined that the required statement was an unreasonable application of the FECA. With respect to the banned speech arguments, however, the majority panel indicated that the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), foreclosed the Committees' arguments. It interpreted *Buckley* to uphold required disclosure of contributor information, regardless of whether a committees' best efforts were used, because there was no "best efforts" provision when the Supreme

Court ruled on the constitutionality of the FECA. Sl. Op. at 15.[10]

With all due respect to the majority, *Buckley* **did not sustain** any such required disclosure. The Supreme Court ruled only on the basis of arguments "to the extent made by the parties." *Buckley*, 424 U.S. at 143 n.178. The case nowhere purported to determine whether complete contributor disclosure could be required consistent with the First Amendment. The only consideration it gave to disclosure concerned deterrence of contributions to unpopular minor parties. *Buckley*, 424 U.S. at 61. In fact, rather than foreclosing the Committees' constitutional claims, *Buckley* supports them.

Buckley established that association through financial contributions is a protected form of speech, a decision that was confirmed subsequently in *Riley v. National Federation of the Blind*, 487 U.S. 781, 797-801 (1988). This determination is in stark contrast to the ban on speech the regulation now imposes. Because the regulation allows some speech (a request for the information and a "thank-you" statement), while banning other speech, it necessarily discriminates against speech based on its content, and thus is subject to strict scrutiny. *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994). Accordingly, the restriction must be narrowly-tailored to serve an overriding state interest. *Id.*

The best efforts regulation fails such strict scrutiny. If the FEC is concerned with contributors overlooking committee requests for additional information, it can confine its regulation to placement and print-size of the request, or to any other method that does not preclude a political committee communicating with its supports at

---

[10] The dissent never considered the constitutional arguments, as Judge Sentelle did not believe the follow-up requirement was severable and, hence, believed the entire regulation had to be struck. D. Op. at 5.

its own expense from saying what it wants to say. There is simply no support for a regulatory *ban* of political speech when the speaker communicates at its own expense, and neither the panel nor the FEC has cited any. Indeed, even if this Court were to treat political solicitations as commercial speech, rather than political speech, as long as the committees' speech is truthful, it may not be banned. *Ibanez v. Fla. Dept. of Bus. & Pro. Regulation*, 114 S. Ct. 2084, 2088 (1994) (in commercial speech context, "only false, deceptive or misleading . . . speech may be banned").[11]

However, even under the majority's view that this prohibition on political parties' speech is content-neutral, the best efforts regulation would still have to be "narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication." Sl. Op. at 16. First, the regulation is not narrowly-tailored, as previously explained. Second, there is no alternative channel that effectively allows committees to explain the additional request for information or ask that the contributor help defray the costs of such additional request(s). Even if committees are free to express their views in other communications, it would be at additional expense and would not explain the follow-up request at the time it is made. Accordingly, there is no effective alternative channel for this type of speech, and the regulation is therefore unconstitutional. *Unites States v. Grace*, 461 U.S. 171, 177 (1983) (laws subject to intermediate scrutiny must allow other effective channels of speech).

---

[11] Indeed, in the commercial speech context, the government is unable to ban brewers from displaying alcohol content of their beers. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995). It is thus striking to consider that, while information on beer labels cannot be banned, truthful speech by political committees to their supporters can be.

Given the infringement on protected speech the existing regulation now provides, further consideration of this case is merited by the Court.

CONCLUSION

For the foregoing reasons, the Committees respectfully request that the Court grant this petition for rehearing and suggest that it grant rehearing *in banc*.

Respectfully submitted,

/s/ Jan Witold Baran
JAN WITOLD BARAN
JASON P. CRONIC

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

April 5, 1996

Counsel for the Appellants

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5248

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Appellants,

v.

FEDERAL ELECTIONS COMMISSION,
Appellee.

Thursday, September 14, 1995
Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice,

Before:

CHIEF JUDGE EDWARDS and CIRCUIT JUDGES SENTELLE and TATEL, U.S. Court of Appeals for the D.C. Circuit.

* * * *

[16] ORAL ARGUMENT OF RICHARD B. BADER, ESQ., ON BEHALF OF APPELLEE

MR. BADER: Good morning, Your Honors.

My name is Richard Bader. I am representing the Federal Elections Commission.

In our view, this was a fairly straightforward rulemaking. The Commission identified a problem. They were not gettting enough disclosure. They held hearings and received comments to try to find out why that was. They

conducted a survey, an anonymous survey of committees to find out what their experiences were.

QUESTION: Counsel, you have to survive not only a *Chevron* view of interpretation, but an APA review on arbitrary and capriciousness.

MR. BADER: That's correct.

QUESTION: Right now, the rule requires that the committee will only be deemed to have exercised best efforts if it sends a followup in particular words with nothing else in it.

If another committee over here sent ten followups and had precisely these words but added the additional [17] sentence, federal law does not require you to furnish us this information, but we really would like for you to because we have to comply, that would not be enough under this rule, would it?

MR. BADER: That's correct, Your Honor.

QUESTION: So, why isn't it arbitrary and capricious to select, require a particular form standing alone of a misleading statement of the law, a misleading and incomplete statement of the law, to require that to determine what best efforts are when you could do ten times as much, be more accurate and fail. Why isn't that arbitrary and capricious?

MR. BADER: Because the best efforts standard requires the committee, at a minimum, to try to induce people to give them the information. If the focus of the solicitation—

QUESTION: Could they lie to the person? Could it require them to lie to the person and say you have to give us this information?

MR. BADER: No and nor does the Commission's regulation require them to lie and say you have to.

QUESTION: Doesn't the Commission's regulation require them to mislead the person?

MR. BADER: We don't think so, Your Honor. In fact—

[18] QUESTION: Well, if you don't permit them to explain the person's rights even in a single clause or a single sentence, why isn't that requiring them to mislead the contributor?

MR. BADER: Well, there are an awful lot of things that could be said that are not said. We don't think that—

QUESTION: Not under this rule, there aren't. There is nothing else that could be said that is not said.

MR. BADER: That's right. What the Commission's rule is intended to do, Your Honor, is to bring in—first of all, I should say—

QUESTION: I would have much less of a problem—let me tell you where I'm coming from—if that word only wasn't in there, if you had said they will be deemed best efforts by doing this. If it were left to the parties to be able to prove by other evidence that they had used other best efforts, I would have much less of a problem. When you put that word only there, I don't see immediately from the face of it why it is not arbitrary and capricious.

MR. BADER: It is not arbitrary and capricious, Your Honor, for a couple of reasons.

First of all, the evidence before the Commission indicated that a number of committees—first of all, the prior rule required, although it didn't require in that exact language, it required a notification that the [19] reporting was required by law. The evidence before the Commission was that, a number of committees were using language such as, federal law requires us to ask for this. It was the position that was being argued here that, in fact, federal law doesn't really quite—

QUESTION: Isn't that an accurate statement of the law?

MR. BADER: Requires to ask?

QUESTION: The question I think Judge Sentelle is asking is, this notice is inaccurate.

MR. BADER: Well, we don't think it is inaccurate, Your Honor. The law, in fact, requires it to be reported.

QUESTION: No, it doesn't. It requires that they either report it or they make their best efforts to get the information.

MR. BADER: That is not the way the law is written, Your Honor. The law is written that—

QUESTION: Did you say the 1979 amendment had no effect?

MR. BADER: No, Your Honor. In fact, the best efforts were enacted in 1976.

QUESTION: 1976, excuse me.

MR. BADER: No, we aren't saying it doesn't an effect. What we say is, it establishes an affirmative defense that the requirement of the statute is that this [20] material be reported. That was a requirement in 1974 and it was continued—

QUESTION: Reported by the committee?

MR. BADER: By the committee, correct, Your Honor.

QUESTION: But not reported by the individual?

MR. BADER: That's correct.

What the best efforts rule was designed to do was not to say that the committee no longer has to report this stuff. What they are saying is, the committee will not be found to be in violation of the law if it is unable to get the information even though it tried, gave its best efforts to obtain it.

QUESTION: Do best efforts imply inaccurately describing the law?

MR. BADER: We don't think it inaccurately describes the law. It says—

QUESTION: If you have that in the mail after you had made a contribution, what in it would lead you to think that you didn't have to reveal the information? Just read the language and tell me what—if you had just made a contribution to a political committee and had not told them that you work for the Federal Elections Commission and they send you this notice. What in it would tell you, signal to you that you don't have to supply that information?

MR. BADER: The fact that it says political [21] committees must report and it does not say that contributions must supply.

QUESTION: You think any citizen would understand that?

MR. BADER: I don't know any citizen—I think most people would. If the statute—if the notice says we are—I've got to tell you. The testimony before the Commission of the RNC's, chief counsel, was that was what they were doing all along. He said, not only were they using the language which, in effect, was the same language that was in there—

QUESTION: Well, that is different from—it seems that it is one thing for a political committee to do it and another thing for an agency of the United States Government to do it.

MR. BADER: He said this, Your Honor. He said if we really wanted to avoid compliance, we would tell the contributors the law does not require and we don't do that. That is what he said. The reason for that is—

QUESTION: Well, that is not the alternative to this language. The alternative to the language you have is to add a sentence that the law doesn't require this. The notice could say the law requires us to make our best efforts to obtain this information. Wouldn't that be completely accurate?

[22] MR. BADER: No, the Commission's concern is this. The Commission's concern is that it be conveyed to the contributors that this is not just something they have to ask for. It is something that is federal law; that there is a federal law that it is important for it to be reported, not just asked for, but reported.

QUESTION: By the committee.

Tell me what it is in the statute or the legislative history anywhere which gives the Commission the authority to beyond requiring the committee to supply the information and encourage contributors to give it?

MR. BADER: To encourage contributors to give it?

QUESTION: Right.

MR. BADER: The best efforts to obtain it. That is, in itself, in the Commission's view, is an obligation to at a minimum encourage contributions to give the information. You haven't made the best effort—contrast the language that we are talking about here.

QUESTION: Your judgment really is based on a proposition that, if you tell a contributor accurately what the law requires, they might not supply the information. That is the position you are taking. If you said we are required to use our best efforts, that fewer people would supply the information. I assume you are right about that. That is probably true.

[23] MR. BADER: It is our view that by saying we are required to make our best efforts is also not an accurate rendition of the law, because the law—the primary obligation of the committee under the law is to report the information.

QUESTION: It's the primary obligation. The very use of your term primary implies that you recognize there is a secondary provision of that statute.

MR. BADER: Absolutely.

QUESTION: That secondary provision is, as Judge Tatel says, that they use their best efforts to obtain it. It does not require them to report contributions absolutely. It requires them to report them if they have them and to make their best efforts to get them. This is not like an IRS requirement that you have to report your income.

MR. BADER: No, that's correct.

QUESTION: That is absolute.

MR. BADER: That's correct. The best efforts—there is no question. The best efforts provision relaxes the obligation from what it was when the Buckley Court reviewed it.

QUESTION: Could you constitutionally require, could the law constitutionally require the individual to report the information here? Under *NAACP* as interpreted in *Buckley*, could the statute constitutionally require the [24] individual to report this—

MR. BADER: I think it absolutely could. In fact, in *Buckley*—

QUESTION: You think it absolutely could?

MR. BADER: In *Buckley*, Your Honor, the Court reviewed a provision requiring individuals to report contributions made to people other than political committees and also to report independent expenditures on their own.

QUESTION: It was a great deal more specific and limited in its terms in *Buckley* than the hypothetical I am positing to you.

MR. BADER: Well then, I'm missing the hypothetical, Your Honor.

QUESTION: I am saying, could they require that every contributor that meets this qualification has to give their principle place of business, their employment, their employer and still be in compliance with *NAACP*?

MR. BADER: Yes, I think they could. That is what was decided in *Buckley*.

QUESTION: You think that is clear?

MR. BADER: Yes, I think in *Buckley* what the Supreme Court said was—

QUESTION: You don't think that is even a constitutional question?

MR. BADER: Well, I think it would have been a [25] constitutional question. I think it was resolved in *Buckley* when they said that the purposes of disclosure here outweigh the privacy interests and they distinguished *NAACP* v. *Alabama*, precisely that ground. As I said, they reviewed and upheld a provision requiring people to —individuals to report contributions when it is in a situation that a political committee was not—

QUESTION: Courts not coming under other—yes.

MR. BADER: Right, when the political committee wouldn't be reporting it.

QUESTION: You don't think that the safety vent created by the political committees and their reporting requirements is part of why they upheld that other reporting requirement on individuals?

MR. BADER: It certainly didn't say so. They didn't say anything to suggest that. They said that the purposes of disclosure outweigh the privacy interests of individuals.

QUESTION: Assume that you are right, that it is constitutional and there is no serious constitutional question. Would the statute permit you to impose a regulation that says the committees have to turn back all contributions that don't meet this reporting requirement?

MR. BADER: Not in its current form. In fact, the Commission actually said that, because that was proposed. [26] The Commission, at the very end of its explanation and justification said, that would be beyond their statutory authority at this point. So, no, we concede that.

QUESTION: Suppose the Internal Revenue Service, suppose the 1040 questioned about contributions to political parties, didn't ask whether you wished to make the contribution, but it simply said, check amount of contribution. The IRS said, well, we are doing that because we really do need to get more money in here and we need to get more money for the elections. This isn't inaccurate. People know they don't have to do it.

Would you have a problem with that?

MR. BADER: Yes, I'd have a problem with—

QUESTION: How is this any different?

MR. BADER: Oh, no, it's different because the statute actually prescribes that. We aren't suggesting that—we have a provision here that requires something which is not explained in detail exactly what it involves. It requires you to make your best effort to obtain this information. Now, these people are in the fundraising business. In their fundraising appeals, they don't say, please be assured that you don't have to give this stuff. It's not important. We will be in compliance, no problem.

That is not a best effort to obtain the information. If you obtain it, you have to try to induce [27] people to provide it. If the focus of the notice is, it doesn't matter to us; we are in compliance if we just make a request and if you don't want to give it, you don't have to; we respect

your rights to privacy, that is not an effort to obtain the information. That's an effort to go through the motions. In fact, that is exactly what the Commission is concerned about.

Now, these people, if they want to talk to their contributors and tell them other things about the law, they can do it, just not in their best efforts solicitation.

QUESTION: So, if the party has an alternative to this, sent a single letter to each person who had not provided the information and had simply them a copy of the statute, that's all, that would be inadequate?

MR. BADER: Nothing in it but a copy of the statute?

MR. BADER: Well, a request to provide the information and then it said, attached is a copy of the statute.

MR. BADER: It would not comply with this regulation; that's correct. I think they are—

QUESTION: Because the statute is not strong enough?

MR. BADER: No, because the statute is very complicated and doesn't—you asked if most people would [28] understand it.

QUESTION: How about just the relevant provisions, just the two or three sentences that go directly on point?

QUESTION: Right, to just quote the statute.

QUESTION: In big, bold print.

QUESTION: Right.

MR. BADER: I think what the Commission was trying to do here, Your Honor, was to simplify the process, make it clear to everybody exactly what they need to do to come within best efforts, to avoid having to dispute the nuances of language. I have to add, there wasn't a single witness before the Commission that had any problem with that, including the RNC's general counsel. He said that he had no problem with a required standard disclosure.

QUESTION: Did he say that he had no problem with a required standard disclosure which was the only possible means of meeting the best effort statute and re-

quired that no other information be simultaneously provided to the contributor?

MR. BADER: The question was put to him and it is on page—

QUESTION: The answer is no to that question, isn't it?

MR. BADER: Well, it wasn't put in that complexity, but the question was asked of him. We are [29] thinking of prescribing standard language that has to be used. Do you have a problem with that. He said no. In fact—

QUESTION: Sense that is not the question before us today, his answer to that question doesn't have any more to do with your valid argument than did the legislative history have to with the command given to your Commission.

MR. BADER: Well, we think that it is—the Commission's view was that, it's job here was that the—the problem was, it was requiring people to notify them it was required before by law before. Many committees were tiptoeing around that, using vaguer language. It becomes a very difficult question for people how do we get within this. The Commission was trying to simplify it and said, look, here is the guideline. They cited to a district judge's decision.

QUESTION: Why didn't they create a safe harbor then instead of an absolute?

MR. BADER: Because they were trying to avoid—

QUESTION: You would be in much better shape if that word only wasn't in there.

MR. BADER: In our view though—

QUESTION: It would have been at least as simple.

MR. BADER: Well, in our view, of course, the whole best efforts provision is a safe harbor. The original [30] act required you to report. It put treasurers in jeopardy of not knowing where they could get the information and that is it.

QUESTION: That doesn't remotely answer the question I just asked you.

MR. BADER: The reason the Commission didn't make a safe harbor is that wouldn't solve the problem of people tiptoeing around the language and using fuzzy language and implying this isn't very important. They were trying to make it very clear that, this is what is required and this is easy to do.

QUESTION: Yes, you are getting to the problem now. Where does the Commission get the power to require this particular, we all seem to think, inadequate statement of the law in this particular form with nothing else accompanying it when Congress said best efforts?

MR. BADER: Well, the Commission thinks that this is the way that people should—that committees can satisfy the best efforts. This is what the best efforts are. It excludes—

QUESTION: You are saying, again, less than what this rule does. The Commission may well think this is the way people can comply with this. That is not the same as saying this is the only way people can show best efforts.

MR. BADER: I understand what you are saying, Your [31] Honor, but what they are trying to do is not only to give a free ride, if you follow this, although that is part of it. They are also trying to make it clear that you have to say that it is required, the reporting is required by law to convey the importance to these people so that you can't say other things along with it that undermine the message of the importance of it.

QUESTION: Even if those other things are short, truthful and pointed?

MR. BADER: You can say it, just not in the stand-alone solicitation for the information. You can say it. You can write letters.

QUESTION: If you want to pay more letter costs, you can say it?

MR. BADER: Well, any time you want to communicate with somebody, you have to pay for the letter.

QUESTION: No, not if you can put it in the same letter, you don't.

MR. BADER: You still have to pay for it.

QUESTION: They don't have to pay more letter costs.

MR. BADER: You are right. They would pay less, but they still have to pay for it.

QUESTION: They don't have to pay one more dime unless you figure the millisecond it takes a word processor [32] to add four words. They don't have to pay one more dime to put other words in that letter.

MR. BADER: They would not have to pay anymore than they have to pay in order to put out the followup standup. I agree with that. Anything else they want to say—the whole point of the stand-alone was because the Commission had testimony that some people—it wasn't because people, most people didn't want to give the information. It was because it was a small part of a large package and the importance of it wasn't coming across to them. So, the Commission wanted to emphasize that point by making it clean and to the point and it said—

QUESTION: And arbitrary.

MR. BADER: Well, we don't think it is arbitrary. We think it reflects the statute and the intention of the statute accurately.

QUESTION: Okay, your time is up, counselor. Thank you.

MR. BADER: Thank you, Your Honor.

THE COURT: Anything on rebuttal? Two minutes, if you want any rebuttal, sir.

REBUTTAL ARGUMENT OF JAN W. BARAN, ESQ., ON BEHALF OF APPELLANTS

THE COURT: I am assuming that we are going to get something in writing from you on your explanation.

APPENDIX N

11 C.F.R. § 104.7 (1993) (New "Best Efforts" Regulation)

(a) When the treasurer of a political committee shows that best efforts have been used to obtain, maintain and submit the information required by the Act for the political committee, any report of such committee shall be considered in compliance with the Act.

(b) With regard to reporting the identification as defined at 11 CFR 100.12 of each person whose contribution(s) to the political committee and its affiliated committees aggregate in excess of $200 in a calendar year (pursuant to 11 CFR 104.3(a)(4)), the treasurer and the committee will only be deemed to have exercised best efforts to obtain, maintain and report the required information if—

(1) All written solicitations for contributions include a clear request for the contributor's full name, mailing address, occupation and name of employer, and include the following statement: "Federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of $200 in a calendar year." The request and statement shall appear in a clear and conspicuous manner on any response material included in a solicitation. The request and statement are not clear and conspicuous if they are in small type of comparison to the solicitation and response materials, or if the printing is difficult to read or if the placement is easily overlooked.

(2) For each contribution received aggregating in excess of $200 per calendar year which lacks required contributor information, such as the contributor's full name, mailing address, occupation or name of employer, the treasurer makes at least one effort after the receipt of the contribution to obtain the missing information. Such ef-

fort shall consist of either a written request sent to the contributor or an oral request to the contributor documented in writing. The written or oral request must be made no later than thirty (30) days after receipt of the contribution. The written or oral request shall not include material on any other subject or any additional solicitation, except that it may include language solely thanking the contributor for the contribution. The request must clearly ask for the missing information, and must include the statement set forth in paragraph (b)(1) of this section. Written requests must include this statement in a clear and conspicuous manner. If the request is written, it shall be accompanied by a pre-addressed return post card or envelope for the response material;

(3) The treasurer reports all contributor information not provided by the contributor, but in the political committee's possession regarding contributor identifications, including information in contributor records, fundraising records and previously filed reports, in the same two-year election cycle in accordance with 11 CFR 104.3; and

(4)(i) If any of the contributor information is received after the contribution has been disclosed on a regularly scheduled report, the political committee shall either:

(A) File with its next regularly scheduled report, an amended memo Schedule A listing all contributions for which contributor identifications have been received during the reporting period covered by the next regularly scheduled report together with the dates and amounts of the contribution(s) and an indication of the previous report(s) to which the memo Schedule A relates; or

(B) File on or before its next regularly scheduled reporting date, amendments to the report(s) originally disclosing the contribution(s), which include the contributor identifications together with the dates and amounts of the contribution(s).

(ii) Amendments must be filed for all reports that cover the two-year election cycle in which the contribution was received and that disclose itemizable contributions from the same contributor. However, political committees are not required to file amendments to reports covering previous election cycles.

[45 FR 15108, Mar. 7, 1980, as amended at 58 FR 57729, Oct. 27, 1993]

APPENDIX O

11 C.F.R. § 104.7 (1980) (Original "Best Efforts" Regulation)

(a) When the treasurer of a political committee shows that best efforts have been used to obtain, maintain and submit the information required by the Act for the political committee, any report of such committee shall be considered in compliance with the Act.

(b) With regard to reporting the identification as defined at 11 CFR 100.12 of each person whose contribution(s) to the committee and its affiliated committees aggregate in excess of $200 in a calendar year (pursuant to 11 CFR 104.3(a)(4)), the treasurer will not be deemed to have exercised best efforts to obtain the required information unless he or she has made at least one effort per solicitation either by a written request or by an oral request documented in writing to obtain such information from the contributor. For purposes of 11 CFR 104.7(b), such effort shall consist of a clear request for the information (i.e., name, mailing address, occupation, and name of employer) which request informs the contributor that the reporting of such information is required by law.

Supreme Court, U.S.
FILED
NOV 20 1996
CLERK

(2)

No. 96-415

In the Supreme Court of the United States

OCTOBER TERM, 1996

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

LAWRENCE M. NOBLE
General Counsel

RICHARD B. BADER
Associate General Counsel

DAVID KOLKER
Attorney
Federal Election Commission
Washington, D.C. 20463

21 pp

QUESTION PRESENTED

Whether the court of appeals properly upheld the Federal Election Commission's regulation defining what constitutes the "best efforts" of political committees to obtain and report identifying information about their contributors under 2 U.S.C. 432(i).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	17

TABLE OF AUTHORITIES

Cases:

American Hosp. Ass'n v. *NLRB*, 499 U.S. 606 (1991)	16
Buckley v. *Valeo*, 424 U.S. 1 (1976)	2, 6, 8, 13
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	15, 17
City of Ladue v. *Gilleo*, 114 S. Ct. 2038 (1994)	14
FEC v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981)	16
Finley v. *United States*, 490 U.S. 545 (1989)	15
Good Samaritan Hosp. v. *Shalala*, 508 U.S. 402 (1993)	14, 15
International Union v. *Donovan*, 746 F.2d 855 (D.C. Cir. 1984), cert. denied, 474 U.S. 825 (1985)	16
Madsen v. *Womens Health Ctr.*, 114 S. Ct. 2516 (1994)	11
McIntyre v. *Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995)	11
Rust v. *Sullivan*, 500 U.S. 173 (1991)	15
United States v. *Grace*, 461 U.S. 171 (1983)	10
Ward v. *Rock Against Racism*, 491 U.S. 781 (1989)	10

Constitution, statutes and regulations:

U.S. Const. Amend. I	2, 6, 7, 10
Administrative Procedure Act, 5 U.S.C. 551 *et seq.*	7

Statutes and regulations—Continued: Page

Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* 2, 3, 8, 9, 11, 14
2 U.S.C. 431(13) 2
2 U.S.C. 432(i) 3
2 U.S.C. 434(b) (1976) 3
2 U.S.C. 434(b)(3)(A) 2
2 U.S.C. 437c(b)(1) 2
2 U.S.C. 437d(a) 2
2 U.S.C. 437d(a)(8) 2
2 U.S.C. 437d(e) 2
2 U.S.C. 437f 2
2 U.S.C. 437g 2
2 U.S.C. 438(d) 16
Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, Tit. I, § 104, 90 Stat. 480 (2 U.S.C. 434(b) (1976)) 3, 6
Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, Tit. I, § 102, 93 Stat. 1347 (2 U.S.C. 432(i)) 3, 6, 15
11 C.F.R.:
Section 104.7 (1981) 3
Section 104.7(b)(2) 5

Miscellaneous:

122 Cong. Rec. (1976):
p. 6963 13
p. 7922 13
58 Fed. Reg. (1993):
p. 57,725 4
p. 57,727 ..... 8, 10
H.R. Rep. No. 422, 96th Cong., 1st Sess. (1979) 6, 12-13, 15, 16

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-415

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 76 F.3d 400. The opinion and judgment of the district court (Pet. App. 23a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1996. A petition for rehearing was denied on June 11, 1996 (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on September 9, 1996. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns a regulation under the Federal Election Campaign Act of 1971 (FECA or Act), 2 U.S.C. 431 *et seq.* The Act requires political committees to disclose to the Federal Election Commission (FEC),[1] *inter alia*, the name, mailing address, occupation, and employer of each contributor whose aggregate annual contributions exceed $200. 2 U.S.C. 431(13), 434(b)(3)(A). This Court held that reporting requirement, first enacted in 1971, against a First Amendment challenge in *Buckley* v. *Valeo*, 424 U.S. 1, 61-84 (1976), although at that time the annual threshold for requiring occupation and employer information for individuals was only $100. *Id.* at 63. The Court found the reporting thresholds "low" and recognized that "[t]hese strict requirements may well discourage participation by some citizens in the political process." *Id.* at 83. Nonetheless, it upheld them as "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68.

The regulation at issue has its origins in a post-*Buckley* amendment to the FECA that added the following sentence to the subsection specifying the information political committees must provide in their reports to the Commission:

---

[1] The Commission is an independent agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d(a) and (e), 437f, and 437g. Congress has expressly authorized the FEC to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1), and to "make, amend, and repeal such rules * * * as are necessary to carry out the provisions of this Act," 2 U.S.C. 437d(a)(8).

> When committee treasurers and candidates show that *best efforts* have been used to obtain and submit the information required by this subsection, they shall be deemed to be in compliance with this subsection.

FECA Amendments of 1976 (1976 Amendments), Pub. L. No. 94-283, Tit. I, § 104, 90 Stat. 480 (codified at 2 U.S.C. 434(b) (1976)) (emphasis added). Four years later, the "best efforts" provision was recodified to its current form with only minor changes in the original language:

> When the treasurer of a political committee shows that *best efforts* have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act or chapter 95 or chapter 96 of [title 26].

FECA Amendments of 1979 (1979 Amendments), Pub. L. No. 96-187, Tit. I, § 102, 93 Stat. 1347 (codified at 2 U.S.C. 432(i)) (emphasis added). The only substantive changes in the provision were the extension of the "best efforts" standard to record keeping as well as reporting, and the deletion of "candidates" as persons to whom the "best efforts" standard is directly applicable; the standard itself was untouched. The FECA has never defined the term "best efforts."

2. As originally promulgated, the regulation implementing the "best efforts" language permitted political committees to satisfy the provision by including a "clear request" for the donor information with their original solicitations. 11 C.F.R. 104.7 (1981). No further efforts to obtain donor information were required. Experience with that regulation, however,

revealed that "weaknesses in the current 'best efforts' regulations appear to have led to a significant percentage of incomplete itemizable contributions for some committees." Pet. App. 56a. For example, during the rulemaking process leading to promulgation of the changed regulation at issue in this case, one group provided a study indicating that, through June 1992, the presidential and congressional (general election) candidates had "failed to identify the donor's occupation and employer for contributions totaling over $36 million" (C.A. App. 169). In particular, the "political committees of President Bush and Governor Clinton failed to report the donor occupation/employer information for well over *half* their large individual contributions." *Ibid.* With respect to the cause of these low response rates, the Republican National Committee acknowledged that "some campaigns make a more serious effort * * * than others"; another witness "revealed that some committees put their requests for donor information in small print, or buried them among other material." Pet. App. 12a.

Such experiences led the FEC in 1993 to revise the regulation implementing the "best efforts" provision. 58 Fed. Reg. 57,725. The amended (and current) regulation provides that when a political committee is unable to obtain and report all the information required by the Act about contributors of $200 or more, the treasurer and committee will be deemed to have satisfied that statutory obligation only if, *inter alia*, the political committee sends a "stand-alone" follow-up request for the information to donors who fail to supply it in response to the committee's original solicitation. *Ibid.* The follow-up request cannot contain "material on any other subject * * * except

that it may include language solely thanking the contributor for the contribution." 11 C.F.R. 104.7(b)(2).[2]

In its Explanation and Justification for the revised regulation, the FEC discussed the pertinent legislative history of "best efforts," Pet. App. 47a-49a, and stressed the "high priority" the Act places on "the public interest in the disclosure of accurate and complete contributor information." *Id.* at 43a. The Commission "also weighed concerns regarding the costs, burdensomeness, and effectiveness of various modifications to the regulations" and "made every effort to ensure that costs are reasonable." *Ibid.* As the court of appeals concluded, "[i]n the end, the Commission's new regulation result[ed] from exactly the kind of agency balancing of various policy considerations to which courts should generally defer." *Id.* at 14a.

3. After the "best efforts" regulation became final, petitioners brought this action in district court to challenge the regulation. In an unpublished decision, the district court granted the Commission's motion for summary judgment. Pet. App. 23a-34a. The court

---

[2] The regulation also required the follow-up request to include specific mandatory language describing political committees' reporting requirements, but the court of appeals invalidated and severed this portion of the regulation. Pet. App. 9a-10a, 17a. No party now challenges that portion of the court's decision. Follow-up requests may thus include an explanation of the reason for the information request, which would be "material on [the same] subject" in compliance with the regulation. See 11 C.F.R. 104.7(b)(2). Petitioners state (Pet. 7 n.6, 10 n.7) that the Commission has "changed its position" in this regard, but the Commission has simply recognized the court of appeals' decision. See Pet. App. 9a.

rejected petitioners' arguments that the legislative history of the "best efforts" provision precludes the Commission's construction and that the FEC had improperly revised its regulation. The court also rejected petitioners' First Amendment challenges to both the stand-alone follow-up requirement and the language required to be used in information requests. The court noted that the regulation only defines a defense in the event political committees fail to report all required information, and thus "does not compel political committees to do anything." *Id.* at 31a. It also found that the "added costs imposed by the new regulation are * * * a minimal burden [that] is not unconstitutional in light of *Buckley*'s recognition of the strong governmental interest involved." *Id.* at 33a (citing *Buckley*, 424 U.S. at 66-68).

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-22a. Noting (*id.* at 3a) that Congress did not define "best efforts" when it added the statutory requirement in the 1976 Amendments or when it recodified the provision in the 1979 Amendments (see 93 Stat. 1347), the court afforded deference to the FEC by determining that there is "nothing in the phrase 'best efforts' to preclude the Commission from requiring committees to make more than one request for the information." Pet. App. 6a. The court reasoned that a 1979 House report carried "little probative weight" as "essentially post-enactment history," *ibid.*, and it rejected petitioners' other arguments that the legislative history limited "best efforts" to a single request for information. *Id.* at 7a; see also H.R. Rep. No. 422, 96th Cong., 1st Sess. 14 (1979). The court also found reasonable the Commission's revision of the regulation in light of its experience with the prior interpretation over the

previous decade. Pet. App. 8a-9a. In addition, the court rejected petitioners' argument that the regulation violated the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* After examining the FEC's rulemaking procedure in great detail (Pet. App. 10a-14a), the court concluded that "the Commission's new regulation results from exactly the kind of agency balancing of various policy considerations to which courts should generally defer." *Id.* at 14a.

With respect to the regulation's mandatory statement to be included in information requests, however, the court of appeals reversed the district court because it found the statement to be inaccurate, misleading, and contrary to the statute. Pet. App. 9a-10a. "Because the Commission's initial proposed regulation did not even include the requirement of a mandatory statement," however, the court found this portion of the regulation to be severable from the requirement of a stand-alone follow-up request. *Id.* at 17a.

Finally, the court of appeals addressed and rejected (Pet. App. 15a-17a) petitioners' First Amendment challenge to the regulation's prohibition on the stand-alone follow-up request "contain[ing] anything other than the request for the missing information, the mandatory statement, and an expression of gratitude." *Id.* at 4a. The court noted *Buckley*'s holding that the Act's disclosure requirements are the "'least restrictive means' of furthering * * * substantial government interests," *id.* at 15a, and found it significant that the "best efforts" provision offers an optional safe harbor that was added only after *Buckley* upheld the statute's absolute disclosure requirements, *ibid.* The court affirmed the district court's observation that the "best efforts" regulation "does

not compel political committees to do anything, and there is no penalty for violation of the 'best efforts' regulation." *Id.* at 16a. In addition, the court of appeals concluded that the restriction of speech was content-neutral. "It forbids additional speech not because of any hostility to the content of that speech, but to 'ensure that a written request for the information is not overlooked.'" *Ibid.* (quoting 58 Fed. Reg. 57,727 (1993)). The court further determined that the regulation imposed only a minimal financial burden that is not unconstitutional, especially in light of *Buckley*'s conclusion that the Act's disclosure requirements serve interests compelling enough to outweigh the fact that they "would financially burden campaigns by deterring some donors from contributing." Pet. App. 17a (citing *Buckley*, 424 U.S. at 68).

ARGUMENT

The decision of the court of appeals upholding the best efforts regulation is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), this Court upheld the FECA's requirement that political committees disclose to the FEC each significant contributor's "name and address, as well as his occupation and principal place of business." *Id.* at 82. The Court explained that such a mandate is constitutional because it "serves informational functions, as well as the prevention of corruption and the enforcement of the contribution limitations." *Id.* at 83. When the statute was upheld in *Buckley*, it contained no exception for a committee that was unable to obtain the required information. As the court of appeals concluded:

> Indeed, because the "best efforts" provision—added to the Act after the Court decided *Buckley*—essentially offers an optional safe harbor or affirmative defense for political committees unable to secure the identifying information, it actually makes the Act's reporting requirements less stringent than the absolute disclosure requirements upheld in *Buckley*. As the district court explained, "the 'best efforts' regulation does not compel political committees to do anything, and there is no penalty for violation of the 'best efforts' regulation." *Republican Nat'l Comm.*, No. 94-1017, slip op. at 11. Because the absolute disclosure requirement at issue in *Buckley* does not violate the First Amendment, neither can an optional safe harbor for those unable to comply with the absolute disclosure requirement.

Pet. App. 15a-16a. Thus, petitioners are incorrect in claiming that the regulation purports to "allow the government unprecedented control over political entities' speech." Pet. 12. By upholding the disclosure provision of the FECA in *Buckley*, the Court has made clear that the Commission may undertake reasonable steps to meet the purposes underlying the statute.

2. a. Contrary to petitioners' assertion, the court of appeals did not hold that "*any manner* in which the FEC chose to define 'best efforts' as a lessening of the disclosure requirement would also be constitutional." Pet. 11 (emphasis added). Instead, as petitioners later concede (Pet. 18), the court of appeals "also considered the speech ban in the required follow-up inquiries on its own terms." See Pet. App. 16a-17a.

The court of appeals properly determined that the regulation's restrictions on additional speech in the follow-up request are content-neutral and thus valid "if they are 'narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" Pet. App. 16a (quoting *United States* v. *Grace*, 461 U.S. 171, 177 (1983)). The regulation prohibits *all* extraneous material from the follow-up request that would clutter and obscure the information request. As the court of appeals explained, the regulation "forbids additional speech not because of any hostility to the content of that speech, but to 'ensure that a written request for the information is not overlooked.'" Pet. App. 16a (quoting 58 Fed. Reg. 57,727 (1993)). But since petitioners remain entirely free to express their views to their contributors on any subject in all other communications, the regulation amounts to nothing more than a reasonable time, place, or manner restriction on such speech. See *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). As the Court stated in *Ward*, the "controlling consideration" for courts in assessing a First Amendment challenge is the government's purpose for the restriction. *Ibid.* The Commission's rationale for the rule is to maximize the likelihood that recipients will not overlook the information request, not to suppress the political messages of committees.

Petitioners essentially concede that the regulation is content-neutral when they state that "the regulation may operate against all speech," Pet. 19 n.16, but they nonetheless contend that because the "ban occurs in a forum for pure political speech, * * * the regulation actually focuses the ban on political speech," *ibid.*, and thus is invalid. The purported

"forum," however, derives solely from the regulation's requirement that political committees make one additional request for donor information without being fettered by other information about politics or other subjects. That requirement does not become "content-based" because petitioners desire to transform the follow-up letter into a vehicle for the dissemination of messages unrelated to the narrowly-tailored, legitimate purpose the letter is required to address. See *Madsen* v. *Women's Health Ctr.*, 114 S. Ct. 2516, 2523 (1994) (injunction preventing protesters from interfering with abortion clinic was content-neutral, despite anti-abortion views of particular protesters).[3]

b. The regulation is narrowly tailored to serve a compelling government interest and leaves open ample alternative channels of communication. As the court of appeals found:

> The administrative record identifies as one cause of low donor response rates the burying of requests for donor information among other material. Because the regulation prohibits that practice, we are satisfied that it promotes the

---

[3] Petitioners also cite (Pet. 18) *McIntyre* v. *Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995), for the proposition that the "best efforts" regulation is content-based. *McIntyre*, however, dealt very specifically with an individual's right to circulate anonymous campaign literature, and the Court explicitly distinguished *Buckley* and the disclosure provisions of the FECA. *Id.* at 1522. Moreover, unlike the Commission's regulation, the provision at issue in *McIntyre* "covered documents * * * defined by their content—only those publications containing speech designed to influence the voters in an election need bear the required markings." *Id.* at 1518.

> very gathering of information that *Buckley* found to be in the public interest.

Pet. App. 16a-17a. Petitioners may urge support for particular candidates and solicit funds to pay for their political activities—in all communications other than the follow-up request—without running afoul of the "best efforts" regulation.[4]

That the law does not obligate contributors to provide the personal identifying information does not lessen the importance of the governmental interest at stake, as petitioners assert, or suggest that "best efforts" should be interpreted to require only a nominal effort by political committees to solicit the information. See Pet. 20. To the contrary, Congress imposed a requirement of "best efforts" on political committees to stress the importance of their making a substantial, rather than *pro forma*, effort to solicit this information from contributors who otherwise may not be aware of the statutory disclosure provisions. Thus, when the "best efforts" provision was recodified in 1979, the Committee on House Administration noted that "[t]he best efforts test is crucial since contributor information is voluntarily supplied by persons who are not under the control of

---

[4] Thus, petitioners are free to explain in their written solicitations that unless the contributor provides the requested information, petitioners will need to expend part of the contribution to make a written or oral stand-alone request for missing contributor information (for contributors over the $200 threshold). Such an explanation would not only be permissible under the regulation, but might also persuade many contributors concerned about petitioners' use of resources to provide the requested information initially, so that fewer follow-up requests would be necessary.

the committee." H.R. Rep. No. 422, *supra*, at 14.[5] Similarly, this Court has already ruled that donors' privacy interests do not render the disclosure provision invalid or reduce the importance of the governmental interest. As the court of appeals explained:

> The Supreme Court considered the important privacy and association rights at stake for donors, acknowledged that "public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute," and held that the disclosure requirements were "the least restrictive means" of furthering the substantial government interests.

Pet. App. 15a (quoting *Buckley*, 424 U.S. at 67-68). In sum, the regulation's restriction on extraneous messages in follow-up requests is content-neutral and narrowly tailored, leaves ample opportunity for petitioners to speak on any subject in all of their

---

[5] In 1976 the Senate rejected an effort to eliminate the requirement of reporting a contributor's occupation and employer. 122 Cong. Rec. 6963. Senator Clark explained that "[d]isclosure of a contributor's occupation and place of business, including the name of the firm where the person is employed, is vitally important if the public is to know and understand the source of a candidate's campaign funds." *Ibid.* When Senator Packwood introduced the "best efforts" amendment only a week later, he did not suggest that it was intended significantly to weaken this reporting requirement or to protect the privacy rights of contributors. Instead, he called it an "anti-nit-picking amendment" that was designed to do no more than protect political committee treasurers when they are unable to obtain the information from contributors even though they tried to do so. See *id.* at 7922.

other communications, and serves compelling governmental interests.[6]

3. a. The "best efforts" regulation is a reasonable interpretation of the FECA. "The starting point in interpreting a statute is its language." *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 409 (1993). Congress did not define "best efforts," but the statutory phrase clearly embraces a range of permissible interpretations, and the Commission's regulation falls easily within that range. First, "best" is an adjective of the superlative degree. Congress did not require "some," "good," or "inexpensive" efforts, but rather "best" efforts. Second, as a plural noun, the term "efforts" on its face is contrary to petitioners' argument (Pet. 24) that the statute precludes the Commission from requiring more than "a single, clear request accompanying each solicitation." Third, the term "efforts" denotes affirmative exertion or work, not passive receptivity. Petitioners' proposal of a single effort that may be fettered by competing information is thus inconsistent with the statute's plain meaning.

Moreover, because "best efforts" is not defined by statute, the Commission's interpretation is entitled to deference. *Good Samaritan Hosp.*, 508 U.S. at 414, 417-418. Here, the amount of effort required of

---

[6] Petitioners' reliance (Pet. 20 n.18) on *City of Ladue* v. *Gilleo*, 114 S. Ct. 2038 (1994), is misplaced. In that case, a city sought to reduce visual clutter as an end unto itself, an interest that was "valid" but not compelling. See *id.* at 2045. Here, the Commission did not act in order to make follow-up requests more attractive, but rather because there was record evidence that requests for donor information had become buried in cluttered texts, thereby depressing the disclosure rate of information that helps prevent the corruption of federal elections.

political committees in the "best efforts" regulation is quite modest, and since the Commission's "interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction." *Id.* at 417. See also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As the court of appeals found, because the regulation does not raise "serious constitutional questions," there is no reason "to assume Congress did not intend to authorize [the regulation's] issuance." Pet. App. 15a (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991)).

b. The regulation is consistent with the legislative history of the Act. As the court of appeals explained (Pet. App. 6a), the 1979 House report upon which petitioners rely in arguing that Congress intended for only a single request to suffice for "best efforts" is "essentially post-enactment history, carrying little probative weight" because the 1979 Amendments merely recodified the 1976 provision without substantial change. See pp. 2-3, *supra*; *Finley* v. *United States*, 490 U.S. 545, 554 (1989) ("Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'").

Petitioners rely (Pet. 23-24) primarily upon a single sentence in the 1979 House Report, which states: "If the committee [has] made an effort to obtain the information in the initial solicitation and the contributor ignored the request, the Commission should not require the committee to make the same request two, three, or four times." H.R. Rep. No. 422, *supra*, at 14. The very next sentence of that House Report, however, makes clear the reasonableness of

the FEC's construction of the "best efforts" language: "On the other hand, if the best efforts test is not met, the committee must be required to take corrective action, *such as contacting the contributor and requesting the information.*" *Ibid.* (emphasis added). Placed in its proper context, the passage to which petitioners refer suggests only that Congress did not intend to authorize the Commission to require repeated and persistent efforts by political committees to obtain the requisite donor information. A single, unfettered follow-up by the recipient, however, comports fully with Congress's intent.[7]

c. Finally, the court of appeals properly concluded that the Commission's new regulation is not unrea-

---

[7] In any event, in stating that the Commission "should not" require committees to make repeated requests for the information, the legislative history on this point at most expresses a preference of "how Congress expected or intended the [agency] to behave," when what is dispositive for this Court is how Congress "*required* [the agency] to behave" in the statutory language itself. *International Union* v. *Donovan*, 746 F.2d 855, 860 (D.C. Cir. 1984), cert. denied, 474 U.S. 825 (1985). Such an admonition may appropriately be read as "a form of notice" that if the Commission required political committees to make numerous redundant requests for applicable donor information, "Congress might respond with a legislative remedy." *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 617 (1991). Pursuant to 2 U.S.C. 438(d), the Commission must transmit any proposed rule or regulation to Congress, and such regulation cannot become final until 30 legislative days have elapsed. With respect to the "best efforts" regulation at issue here, no legislation or resolution was introduced to overrule the Commission's new regulatory interpretation of "best efforts," thus providing an important "indication that Congress does not look unfavorably" upon the Commission's construction of the Act. *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 34 (1981).

sonable simply because its prior regulation required only one clear request for contributor information:

> As the Court stated in *Chevron*, "[a]n initial agency interpretation is not instantly carved in stone." 467 U.S. at 863. "[T]o engage in informed rulemaking," the Court observed, an agency "must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64. That is exactly what the Commission did here. The mere fact that the Commission changed the prior regulation does not make the new regulation an unreasonable construction of the statute.

Pet. App. 8a-9a. Accordingly, the Commission's explanation is entitled to deference. See, *e.g.*, *Chevron*, 467 U.S. at 863.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

LAWRENCE M. NOBLE
General Counsel

RICHARD B. BADER
Associate General Counsel

DAVID KOLKER
Attorney
Federal Election Commission

NOVEMBER 1996

(3)

Supreme Court, U.S.
FILED
DEC 2 1996
CLERK

No. 96-415

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

REPUBLICAN NATIONAL COMMITTEE,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
and
NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

JAN W. BARAN
Counsel of Record
ALEX M. AZAR II
JASON P. CRONIC
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Counsel for the Republican National Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee

December 2, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

9pp

TABLE OF CONTENTS

	Page
ARGUMENT	2
I. THE COURT SHOULD NOT PERMIT THIS UNWARRANTED AND UNAUTHORIZED SUPPRESSION OF POLITICAL SPEECH TO CONTINUE	2
II. THE BEST EFFORTS REGULATION IS NOT AUTHORIZED BY FECA	3
III. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S ESTABLISHED FIRST AMENDMENT PRECEDENTS	4
CONCLUSION	6

TABLE OF AUTHORITIES

CASES: Page

Buckley v. Valeo, 424 U.S. 1 (1976) 2, 5
Colorado Republican Fed. Campaign Comm. v. FEC, 59 F.3d 1015 (10th Cir. 1995) 2
Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996) 2
Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977) 6
McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995) 2, 3, 5, 6
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) 2
Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995) 6
Ward v. Rock Against Racism, 491 U.S. 781 (1989) 6
44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996) 4

MISCELLANEOUS:

11 C.F.R. § 104.7 (1993) 1, 5
FEC Final Rule, 60 Fed. Reg. 64,260 (1995) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-415

REPUBLICAN NATIONAL COMMITTEE,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

and

NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONERS' REPLY BRIEF

The Federal Election Commission's "best efforts" regulation, 11 C.F.R. § 104.7 (1993), conflicts with fundamental First Amendment principles, permits a grave intrusion into the right of free political speech and discourse that is essential to our First Amendment liberties, and cannot be squared with this Court's precedents. Accordingly, this Court should act to protect the core constitutional rights at stake.

ARGUMENT

I. THE COURT SHOULD NOT PERMIT THIS UNWARRANTED AND UNAUTHORIZED SUPPRESSION OF POLITICAL SPEECH TO CONTINUE.

This case presents more than an instance of error correction for the Court. The Court of Appeals decision permits a significant and unauthorized intrusion into the political speech between political committees and contributors. Political speech "occupies the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1518 (1995). And as the Court has stated: "[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

That the decision below rests on a fundamentally flawed reading of this Court's jurisprudence in an area of such significance counsels in favor of review. *Buckley v. Valeo*, 424 U.S. 1 (1976), defines the outer limits of federal intrusion into political free speech, and this Court has been at pains recently to emphasize the strict reading that should be given that decision. *See Colorado Republican Fed. Campaign Comm. v. FEC*, 116 S. Ct. 2309 (1996).[1] The Court of Appeals has—in a manner at odds with the clear text and holding of *Buckley*—improperly expanded what the Court would contain. The decision below will

---

[1] The *Colorado* case itself highlights the importance of considering the lower court's decison here. The appellate court opinion in that case, *Colorado Republican Federal Campaign Comm. v. FEC*, 59 F.3d 1015 (10th Cir. 1995), (which was ultimately reversed), was relied on by the FEC in promulgating an overbroad regulation, despite this Court's pending consideration of the issue. *See* FEC Final Rule, 60 Fed. Reg. 64,260, 64,270 (1995). Given the core First Amendment concerns which permeate the FEC's regulatory domain, there is a vital need to review decisions that erroneously regulate speech so that those decisions are not used to justify further violations of constitutional rights.

embolden the FEC to rely on a "blunderbuss" approach, to regulating political speech, *see McIntyre*, 115 S. Ct. at 1524, justifying itself with *Buckley*'s supposed sanction of a "by any means necessary" approach in the name of disclosure. Such heavy-handed intrusion into protected speech must not be tolerated by this Court.

Review here is made even more important given the unique role of the FEC in regulating the political campaigns of the nation. Given this responsibility, the Court must be particularly vigilant in policing the FEC's conduct as it touches on the core of our First Amendment liberties. The best efforts regulation, as it now stands, is a nakedly content-based suppression of political speech that can aptly be described as a draconian overaction by the agency. Without correction and clear guidance from this Court, further unjustified encroachments by the FEC are inevitable.[2]

II. THE BEST EFFORTS REGULATION IS NOT AUTHORIZED BY FECA.

The Petition establishes the unreasonableness and unlawfulness of the FEC's construction of the best efforts provision in FECA. Petition at 22-26. The FEC responds that "Petitioners' proposal of a single effort that may be fettered by competing information is . . . inconsistent with the statute's plain meaning." Opposition at 14. That statement is indeed remarkable, given that this single effort proposal is *precisely what the FEC required in its old best efforts regulation*, App. at 107a, a regulation that remained in place for over a decade.

---

[2] Moreover, it would be fruitless to wait—as the FEC suggests, Opposition at 8—for a conflict to develop within the Circuits on the constitutionality of the best efforts regulation. Political committees are transient by nature, limited in administraive resources, and ill-equipped to mount years-long constitutional challenges. Should the lower court decision stand, other challenges are most unlkely.

That the FEC has so blithely disregarded what its own prior rulemaking indicated was a carefully reasoned regulation grounded in congressional intent, *see* Petition at 23-24, should give this Court considerable pause at the thought of allowing the new regulation to remain in force. Simply stated, the FEC is insufficiently sensitive to the First Amendment concerns that permeate its regulation.[3] The agency may be able to regulate such things as typeface or placement of requests, but it is beyond its powers to redefine its regulation in a manner that eradicates speech.

III. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S ESTABLISHED FIRST AMENDMENT PRECEDENTS.

The FEC claims that the Court of Appeals correctly held that this Court's decision in *Buckley* resolves any doubt about the constitutionality of the best efforts regulation. *See* Opposition at 8-9; App. at 15a-16a. The Court, however, had no occasion there to address the free speech implications of any mandatory and restricted communications between political committees and contributors regarding the disclosure requirements because, at the time, there were no such dictated communications. As discussed more fully in the Petition (at 15-16), this separate intrusion on free political speech must be justified in its own right.

The Court of Appeals held that the " 'best efforts' provision—added to the Act after the Court decided *Buckley*—essentially offered an optional safe harbor or affirmative defense for political committees unable to secure the

---

[3] Significantly, the Opposition fails to address the Petition's reliance on *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), for the proposition that speech bans are not simple tools at the agency's disposal but dire measures that must be justified on their own terms. This is further evidence that the agency refuses to recognize the First Amendment implications of its actions.

identifying information" and thus "actually makes the Act's reporting requirements less stringent than the absolute disclosure requirements upheld in *Buckley*." App. at 15a-16a. This is a fundamental mistake. *Buckley* did not uphold the absolute disclosure requirements; it did not address that issue. *Buckley*, 424 U.S. at 60. Even taken this flawed premise as true, however, the FEC's extension fails as a matter of logic and practice.

The best efforts provision of the statute—and of the FEC's challenged regulation—does not reflect Government beneficence, i.e., an *optional* way to comply with the absolute disclosure requirements of the statute. Indeed, the FEC admits as much when it states, "Congress imposed a *requirement* of 'best efforts.' " Opposition at 12 (emphasis added). That is so because the best efforts provision of the Act is effectively the only available means of compliance, given the absence of any requirement for contributors to disclose the sought-after information. And the FEC, in determining what constitutes "best efforts," has made its definition mandatory, not optional: "the treasurer and the committee *will only* be deemed to have exercised best efforts if" the FEC's follow-up communication procedures are obeyed to the letter. 11 C.F.R. § 104.7 (1993) (emphasis added). This is a safe harbor surrounded by reefs and shoals and the wreckage of the First Amendment.

There is also conflict between the decision below and *McIntyre*, as the lower court subjected this ban on political speech to only intermediate scrutiny.[4] It would indeed be

---

[4] The FEC also asserts that *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995), itself distinguished *Buckley* and the disclosure provisions of FECA. *See* Opposition at 11 n.3. That is misleading. The relevant portion of *McIntyre* discussed *Buckley* not in the context of determining whether the statute at issue was content-based but in evaluating the nature of the state's interest in suppressing that speech. The Court distinguished the state's interest in *Buckley* in deterring corruption in national campaigns through public disclosure, an interest the Court in *McIntyre* found wholly inapplicable in the context of an individual and independent pamphleteer. *See McIntyre*, 115 S. Ct. at 1522-23.

ironic if the fundamental right of free speech in political campaigns was to receive equal, or even subordinate, treatment with the right to label the alcoholic content of beer, *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), the right to put a "For Sale" sign on one's lawn, *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977), or the right to play loud rock-and-roll music. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). *McIntyre* explicitly recognizes the importance of political speech and accordingly dictates the higher level of protection it must receive. *McIntyre*, 115 S. Ct. at 1519.

CONCLUSION

In sum, this case presents important issues of law that must be resolved. For the above reasons and the reasons set forth in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

JAN W. BARAN
Counsel of Record
ALEX M. AZAR II
JASON P. CRONIC
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Counsel for the Republican National Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee

December 2, 1996